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THE UNIVERSITY OF MISSOURI BULLETIN

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BAR BULLETIN

EQUITABLE RELIEF AGAINST NUISANCES AND SIMILAR WRONGS IN MISSOURI

NOTES ON RECENT MISSOURI CASES



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Equitable Relief Against Nuisances and Similar Wrongs In Missouri¹

I. PRIVATE NUISANCE.

Definition. In order the better to secure to the owner and occupier of land its proper use and enjoyment the common law has recognized certain rights in addition to the mere right of possession which is redressed by the action of trespass. These non-possessory rights are called natural rights because, like the right of possession, they exist irrespective of the consent of others.² These natural rights have been summarized as follows:³

- (1) To have the air free from unreasonable pollution by

¹The substance of this article will appear shortly in a book on Equity with notes on Missouri cases and is used here with the permission of the publishers.

²And are thus distinguished from consensual rights; easements and profits are usually consensual but may be acquired by prescription.

³Tiffany, Real Property p. 649. The list is not entirely complete: for example, the storing of large quantities of dangerous explosives in close proximity to a dwelling is a nuisance; *French v. Mfg. Co.* (1913) 173 Mo. App. 220, 226, 158 S. W. 720; *Liggett v. Powder Mfg. Co.* (1917) 274 Mo. 115, 119, 202 S. W. 372; or the use of such explosives in a thickly populated community. *Blackford v. Herman Co.* (1908) 132 Mo. App. 157, 163, 112 S. W. 287.

⁴*Cooke v. Forbes* (1867) 5 Eq. Cas. 106 (ammonia fumes); *Kirchgraber v. Lloyd* (1894) 59 Mo. App. 59 (vapors and smoke from brick kiln); *Sultan v. Parker-Washington Co.* (1906) 117 Mo. App. 636, 644, 93 S. W. 289 (fumes from asphalt plant); *Bielman v. R. R.* (1892) 50 Mo. App. 151 (stock yards). See also *St. Louis Safe Deposit Co. v.*

disagreeable vapors' and odors' and also free from unreasonable noise.'

(2) To have water in a natural watercourse flow past his land without diminution,' deterioration,' or alteration' by acts on the part of others.

Kennett Est. (1903) 101 Mo. App. 370, 374, 74 S. W. 474 (heat from smoke stack).

¹*Ill. Cent. R. R. Co. v. Grabill* (1869) 50 Ill. 241 (odor from cattle pens); *Zugg v. Arnold* (1898) 75 Mo. App. 68 (odors from slaughter house); *Danker v. Goodwin Mfg. Co.* (1903) 102 Mo. App. 723, 730, 77 S. W. 338. (stanches from candle factory); *Desberger v. University Heights Co.* (1907) 126 Mo. App. 206, 218, 102 S. W. 1060 (sewage); *Gorman v. R. R.* (1912) 166 Mo. App. 320, 328, 148 S. W. 1009 (filth from privies). That an ordinary pond is not a nuisance see *Holke v. Herman* (1900) 87 Mo. App. 125, 134.

²*Soltaw v. De Held* (1851) 2 Sim. (N. S.) 133 (bell ringing); *Leete v. Pilgrim Cong'l. Soc'y* (1884) 14 Mo. App. 590 (bell ringing); *McNulty v. Miller* (1912) 167 Mo. App. 134, 151 S. W. 208; *Hayden v. Tucker*, (1866) 37 Mo. 214, 217 (stallions and jacks kept for breeding purposes); *Tarkio v. Miller* (1912) 167 Mo. App. 122, 151 S. W. 208 (ditto)

³*Corning v. Winslow* (1869) 40 N. Y. 191 (diversion of waters from their natural channel, thus interfering with plaintiff's use of water for power).

⁴*Lingwood v. Stowmarket Co.* (1865) 1 Eq. Cas. 77 (refuse of paper mill discharged into a river); *Schumacher v. Shawhan* (1902) 93 Mo. App. 573, 578, 67 S. W. 717 (refuse from distillery); *Hanlin v. Burk Bros.* (1913) 174 Mo. App. 462, 160 S. W. 547 (pollution of stream); *Joplin Mining Co. v. Joplin* (1894) 124 Mo. 129, 135, 27 S. W. 406. (sewage).

⁵*McCormack v. Horan* (1880) 81 N. Y. 86 (dam causing flowage over land of an upper proprietor). Where the defendant's act is direct—as, for example, where he desires the particular result—it would seem that trespass would lie; but the distinction between direct and indirect acts is a troublesome one of degree and flowage cases are apparently classified under nuisances. Whether the tort is trespass or nuisance makes little or no difference in equity. *Codman v. Evans* (1863) 7 Allen (Mass.) 431. See also *Pixley v. Clark* (1866) 35 N. Y. 520 (obstruction injuring land by percolation; *King v. Tiffany* (1832) 9 Conn. 162 (obstruction interfering with operation of a mill up stream); *George v. Wabash etc. Ry.* (1890) 40 Mo. App. 433, 445; *Desberger v. University Heights Co.* (1907) 126 Mo. App. 206, 219, 102 S. W. 1060.

- (3) In some states, to discharge water on adjacent land.²³
- (4) In a few jurisdictions, to be free from injury by the escape of water artificially collected on another's land.²⁴
- (5) To have his land supported by adjacent ²⁵ and subjacent ²⁶ land.

Any violation of these natural rights²⁷ is called a private nuisance.²⁸

²³*McDaniel v. Cummings* (1890) 83 Cal. 515. This is the rule of the civil law. For the "common law rule" *contra*, see *Garrison v. Hargadon* (1865) 10 Allen (Mass.) 106; Tiffany, Real Property sec. 298, page 664. The "common law rule" seems to prevail in Missouri; *Collier v. C. & A. R. R.* (1892) 48 Mo. App. 398, 402 and cases cited; *Goettentroeter v. Kuppelman* (1899) 83 Mo. App. 290, 293; *Beauchamp v. Taylor* (1908) 132 Mo. App. 92, 96, 111 S. W. 609.

²⁴If the one collecting the water is negligent in allowing it to escape he is of course liable on ordinary tort principles of negligence. In England he has been held liable at peril for the escape; *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330, but the rule has not been followed extensively in this country, and the tendency of later English cases has been to restrict the scope of the decision. It may be questioned whether such a collecting of water is such a private nuisance as would ever be enjoined. See *Weishar v. Sheridan* (1912) 168 Mo. App. 181, 184, 153 S. W. 64; *Grant v. R. R.* (1910) 149 Mo. App. 306, 310, 130 S. W. 80, *Grimes v. R. R.* (1914) 184 Mo. App. 117, 122, 168 S. W. 318. And see also University of Mo. Bulletin Law Series 8, Page 20.

²⁵*Wyatt v. Harrison* (1832) 2 Barn. & Adol. 871, Tiffany, Real Property Sec. 301. *Victor Mining Co. v. Morning Star Mining Co.* (1892) 50 Mo. App. 525, 530.

²⁶*Humphries v. Brogden* (1850) 12 Q. B. 739; Tiffany, Real Property. Sec. 302; *C. & A. R. R. v. Brandow* (1899) 81 Mo. App. 1, 8; *Kansas City etc., R. R. Co. v. Sandlin* (1913) 173 Mo. App. 384, 393, 158 S. W. 857.

²⁷The reader is reminded that legal rights are historically the product of legal remedies and not *vice versa*; hence these natural rights exist because the law has in these cases given a remedy.

²⁸The word "nuisance" means literally nothing more than wrongful harm and it is not always used in the narrow, specialized sense attached to it by Tiffany. For the sake of clearness and definiteness it will be used in this article in the narrow sense unless otherwise indicated.

Remedies. Since a private nuisance does not involve direct interference with possession the appropriate common law remedy is not the action of trespass but an action on the case;²⁸ in this action the plaintiff ordinarily²⁹ recovers for any damage he may have suffered down to the date of bringing his action. But if the nuisance consists of a permanent structure the weight of authority in this country is that he not only may³⁰ but must recover prospective damages also.³¹ This amounts, in substance, to an informal eminent domain, the plaintiff being thus paid by the judgment for an easement which the defendant thereby ac-

²⁸The early common law remedies of *assise of nuisance* and *quod permittat prosternere* had already become obsolete by the time of Blackstone having been superseded by the action on the case; Bl. Comm. Book III, 220. In both the early actions the plaintiff was able to get a judgment not only for damages but for abatement also, but they were much circumscribed in other particulars. Both required that the plaintiff have a freehold interest in the land damaged and the *assise of nuisance* lay only against the wrongdoer; the *quod permittat prosternere* lay, also, however, against an alienee who continued the nuisance. *Jarvis v. St. Louis etc. R. R.* (1887) 26 Mo. App. 253, 257 (leaving carcass of cow unburied.)

²⁹See 61 U. of Pa. Law Rev. 614. *Dickson v. R. R.* (1880) 71 Mo. 576, 579 (crops destroyed for two years by overflow); *Van Hoosier v. St. Joseph R. R.* (1879) 70 Mo. 145, 148; *Hudson v. Burk* (1891) 48 Mo. App. 314, 317; *McKee v. St. Louis etc. R. R.* (1892) 49 Mo. App. 174, 182; *Bielman v. R. R.* (1892) 50 Mo. App. 151, 156; *Long v. Kansas City* (1904) 107 Mo. App. 533, 538, 81 S. W. 909.

³⁰In a few jurisdictions the plaintiff may elect; *Danielly v. Cheeves* (1894) 94 Ga. 263, 21 S. E. 524; *City of North Vernon v. Voegler* (1885) 103 Ind. 314, 2 N. E. 821.

³¹See Sedgwick, Damages, 9th ed. sec. 95. For a criticism of this prevailing view see 2 Cal. Law Rev. 248-250. The points urged are briefly as follows: (1) It permits an easement to be acquired without formal condemnation for a private use, because a complete recovery bars all subsequent actions; (2) the easement may be created within a period less than the period of prescription; (3) in order that a subsequent purchaser shall find out the existence of the easement he must search the record for actions brought by previous owners of the land; (4) the rule encourages litigation because a plaintiff whose present damage is slight will be compelled to sue because the running of the statute of limita-

quires. The common law also allows the party injured to abate it;²¹ in case of emergency such a privilege is often of great importance.

Altho the jurisdiction of equity for the specific reparation and prevention of private nuisance is of comparatively modern growth, it has come now to furnish the most usual remedy. Where the plaintiff could have recovered substantial damages at law equity will usually order the defendant to abate the nuisance.²² Such a remedy is ordinarily more advantageous than the common law action for damages, because if the plaintiff recovers

tions will bar him entirely; and a defendant is compelled to pay for a permanent injury tho he might later remove the cause of the damage; (5) it raises the difficult question of what is and what is not a permanent nuisance. See also 8 Mich. Law Rev. 227; 11 Harv. Law Rev. 277; 9 Col. Law Rev. 538. *Markt v. Davis* (1891) 46 Mo. App. 272, 274; *Dickson v. C. R. & P. R. R.* (1880) 71 Mo. 575, 579, *dictum*; *Scott v. City of Nevada* (1893) 56 Mo. App. 189, 191; *Hanlin v. Burke Bros.* (1913) 174 Mo. App. 462, 468, 160 S. W. 547 (well entirely destroyed). And see *Hayes v. R. R.* (1913) 177 Mo. App. 201, 217, 162 S. W. 266; *Babb v. Curators* (1890) 40 Mo. App. 173, 178 (permanent injury to market value by sewer, not removed by removal of sewer). In *Smith v. Sedalia* (1912) 244 Mo. 107, 123, 149 S. W. 597 it was held that the plaintiff could not collect prospective damages for the turning of sewage into a creek upon plaintiff's farm and also get an injunction.

²¹He may destroy property in thus abating if it is the only reasonable and feasible method of achieving the result. *Brill v. Flagler* (1840) 23 Wend. 354 (dog that disturbed by incessant barking and howling at night). But he cannot lawfully abate unless he can do so peaceably. *Mohr v. Gault* (1860) 10 Wis. 513. *City of Chillicothe v. Bryan* (1903) 103 Mo. App. 409, 414, 77 S. W. 465 (liable for excess in abating). See also *Allison v. City of Richmond* (1892) 51 Mo. App. 133, 136 (city has no power to order destruction of frame building merely because it was in a dangerous situation, and annoying to the public).

²²*Crump v. Lambert* (1867) L. R. Eq. 409. The exceptions to this rule will be discussed *post* pp. 22-26. *Paddock v. Somes* (1890) 102 Mo. 226, 240, 14 S. W. 746 (injunction granted as of course if proved nuisance is of continuous or constantly recurring character); *Fischer v. R. R.* (1908) 135 Mo. App. 37, 41, 115 S. W. 477; *Baker v. McDaniel* (1903) 178 Mo. 447, 467, 77 S. W. 531.

The plaintiff may in the same suit get an injunction and damages

damages only to the date of the action he will be compelled to bring an action every few years to prevent the acquisition of an easement;²² and if he recovers prospective damages also his land becomes subject to an easement at once.

Moreover, the equitable remedy is preferable to private abatement because: (1) if the injured party abates he loses his right to sue for the damage already suffered,²³ whereas if he gets an injunction in equity he may get as incidental thereto compensation for past damages; (2) the injured party cannot abate if the nuisance is only threatened²⁴ but such an objection would not ordinarily defeat an injunction;²⁵ (3) one who abates takes the risk of being able to show that there really was a nuisance and that in abating he did nothing which was not reasonably necessary to his protection;²⁶ if he fails to do this he himself becomes a tortfeasor. A court of equity, on the other hand, places the burden of abating upon the defendant with no risk to the plaintiff.

Essential elements—test. In order to constitute a nuisance

down to the date of bringing the action; *Whipple v. McIntyre* (1896) 69 Mo. App. 397 (pig sty).

And injunction will not issue if the danger is merely speculative; *St. Louis etc. R. R. v. Schneider* (1888) 30 Mo. App. 620, 637; *Holke v. Herman* (1900) 87 Mo. App. 125, 135; *Lester Real Estate Co. v. City of St. Louis* (1902) 169 Mo. 227, 235, 69 S. W. 300. On the other hand, it is not necessary to wait till damage is inflicted; *Wood v. Craig* (1908) 133 Mo. App. 548, 552, 113 S. W. 676; *Mason v. Deitering* (1908) 132 Mo. App. 26, 34, 111 S. W. 862; *Caskey v. Edwards* (1907) 128 Mo. App. 237, 244, 107 S. W. 37.

The mere fact that a city ordinance makes a thing unlawful is not enough to obtain an injunction; *Warren v. Cavanaugh* (1883) 33 Mo. App. 102, 108.

²²Unless the recovery of the judgment at law overcomes the obstinacy of the other party and induces him to abate the nuisance.

²³*Baten's Case* (1611) 9 Co. Rep. 53 b, 54 b.

²⁴*Gates v. Blincoe* (1834) 2 Dan. (Ky.) 158.

²⁵Unless it is fairly clear that the plaintiff is in no imminent danger. *Fletcher v. Bealy* (1885) 28 Ch. D. 188, vat wash emptied by the defendant into the river would not injure the plaintiff for some time.

²⁶*State v. Moffett* (1848) 1 G. Greene 247.

the injury complained of must have been caused by the act of some human being; if it is the result of natural causes to which the act of man has not contributed, the plaintiff is without remedy either at law or in equity. In *Roberts v. Harrison*²⁷ a petition was filed for the removal of a pond that had collected on the defendant's land. Relief was denied because "the accumulation of water was due to natural causes, and the defendant did not, by his own act or negligence, contribute to bring about the alleged nuisance. . . . The defendant had done nothing to interfere with the natural drainage, and the pond was formed by the overflow of the creek, due entirely to causes over which the defendant had no control."

Furthermore, even if the damage had been caused by the defendant's act, he may escape liability if the social interest in the doing of the act is sufficiently great to justify it and the damage caused thereby. In *Middlesex Co. v. McCue*²⁸ the plaintiff asked that the defendant be restrained from filling the plaintiff's mill pond. The defendant owned and cultivated in the ordinary way land upon the side of a hill sloping down to the pond. On account of the great importance of having land cultivated relief was denied.²⁹ "Liability depends upon the nature of the act and of the kind and degree of harm done, considered in the light of expediency and usage. . . . [The plaintiff] complains not that substances brought down are offensive, but that the defendant caused any solid substances to be brought down at all. Practically it would forbid the defendant to dig his land, at least without putting up a guard, since the surface drainage necessarily carries more of the soil along with it if the earth is

²⁷(1897) 101 Ga. 773, 28 S. E. 995. See 12 Harv. Law Rev. 63; *Mohr v. Gault* (1860) 10 Wis. 513.

²⁸(1889) 149 Mass. 103, 21 N. E. 230.

²⁹See also *Giles v. Walker* (1890) 24 Q. B. D. 656, cultivation of forest land caused thistles to grow and spread their seed to adjoining land. It seems fairly clear that by legislation under the police power, a duty might be imposed upon the land occupier in such cases and perhaps even in a case like *Roberts v. Harrison*, *supra*.

made friable by digging. . . . We are of the opinion that a man has a right to cultivate his land in the usual and reasonable way, as well upon a hill as in the plain and that damage to the lower proprietor of the kind complained of is something that he must protect himself against as best he may."⁸

If the alleged nuisance consists of interference with health and comfort, the test is what is reasonable under all the circumstances according to the standard of people generally. In *Rogers v. Elliott*⁹ the plaintiff complained of the ringing of a bell in a church just across from the residence of his father, with whom the plaintiff lived. The latter had suffered a sunstroke and because of this he was thrown into convulsions every time the bell was rung. It was held proper to direct a verdict for the defendant: "A fundamental question is, by what standard, as against the interests of a neighbor, is one's right to use his real estate to be measured. . . . The inquiry always is, when rights are called in question, what is reasonable under the circumstances. If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the

⁸Another case involving the social interest in the improvement of land is *Falloon v. Schilling* (1883) 29 Kan. 292. In that case the plaintiff's petition alleged that in order to compel the plaintiff to sell to the defendant a piece of land at the defendant's price, the latter threatened to put upon his own land small tenement houses and rent them to negroes, and had actually erected one house and rented 't to a negro family, to the great annoyance etc. of the plaintiff. The demurrer to the petition was sustained on the ground that the size of the buildings was a matter for the defendant to determine and that "the law makes no distinction on account of race or color and recognizes no prejudices arising therefrom. As long as that neighbor's family is well behaved, it matters not what the color, race or habits may be, or how offensive personally or socially it may be to the plaintiff; plaintiff has no cause of action in the courts."

⁹(1888) 146 Mass. 349, 15 N. E. 768.

importance of the business from which it proceeds, that must be determined by the effect of noise upon people generally and not upon those on the one hand, who are peculiarly susceptible to it, or those, on the other, who by long experience have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbance without suffering; nor upon those whose mental or physical condition makes them painfully sensitive to everything about them."

Damage. Where the alleged nuisance consists of an interference with personal comfort no tort is proved unless substantial damage is shown^m. But where the alleged nuisance consists of an injury to land or to the beneficial use thereof there has been a strong tendency to regard the plaintiff's right as actionable without proof of any damage. In *Mann v. Willey*ⁿ the plaintiff complained that the defendant, an upper riparian proprietor, had polluted the water of Gulf Brook by discharging all the sewage from his hotel into it. The only use to which the plaintiff had ever put the water was for bathing and turning a turbine wheel and the defendant contended that since for such purposes the water was in no way injured there was no tort and the plaintiff was not entitled to an injunction. This contention was held unsound: "That the discharge of such sewage into the stream does pollute and render it unfit for domestic purposes cannot be doubted, and is, we think, established by the evidence, and even though the plaintiff has not as yet put the waterⁿ to such a use, she had the right to the stream in its natural purity. . . . And that right was not conditioned upon the beneficial user of it. . . . And she was entitled to equitable re-

^m*St. Helen's Smelting Co. v. Tipping* (1865) 11 H. L. C. 642, 650.

ⁿ(1900) 51 N. Y. App. Div. 109, 1 Ames Eq. Cas. 572.

ⁿMost of the cases holding the plaintiff's right to be technical have been cases of water rights, but *Dana v. Valentine* (1842) 5 Metc. 8, was the case of a slaughter house and *Farley v. Gate City Gas Light Co.* (1898) 105 Ga. 323, 31 S. E. 192, the plaintiff complained of gas and noxious vapors.

lief against the defendant for interfering with it though the damages were merely nominal."¹

Wherever the natural right is thus held to be technical,"

¹See *contra*, *Strugis v. Bridgman* (1879) 11 Ch. Div. 852. The defendant was a confectioner and for twenty-six years used on his premises pestles and mortars for breaking up and pounding hard substances. The plaintiff, a physician, built his consulting room against the defendant's wall and the noise and vibration of operating the pestles and mortars interfered with his practice. In answer to a suit for an injunction the defendant set up prescription but the court decided against this contention on the ground that the plaintiff had no cause of action till he suffered damage. But see *Roberts v. Gwyrfa District Council* (1899) 1 Ch. D. 583, adopting the prevailing American doctrine in a case of altering the current of a stream; 13 Harv. Law Review 142. In *Howard Co. v. R. R.* (1895) 130 Mo. 652, 32 S. W. 651, a distinction was taken between a case where the damage can be measured once for all at the time of the creation of the alleged nuisance and a case where the amount of damage depends upon future events, holding that only in the former case does the prescriptive period begin at once; see 4 Harv. Law Rev. 435. *Paddock v. Sones* (1890) 102 Mo. 226, 14 S. W. 746: "and courts of equity will more readily interpose in such instances where the damages recovered are merely nominal, and therefore inadequate to prevent a repetition of the injury." *Freudenstein v. Heine* (1878) 6 Mo. App. 287, 289: "It is not essential to a recovery that plaintiff should prove actual damage."

²The reasons given as to whether the right should be considered a technical right are usually unsatisfactory. In *Farley v. Gate City Gas-Light Co.* *supra*, the court gave the fictitious reason that "the law imports damages" which is only another way of saying that it is unnecessary to prove any damage and does not answer the question at all. The real question is a rather difficult one of balancing of interests. In *Sturgis v. Bridgman*, *supra*; "It would be on the one hand in a very high degree unreasonable and undesirable that there should be a right of action for acts which are not in the present condition of the adjoining land, and possibly never will be any annoyance or inconvenience to either its owner or occupier; and it would be on the other hand, in an equal degree unjust, and from a public point of view, inexpedient that the use and value of the adjoining land should, for all time and under all circumstances, be restricted and diminished by reason of the continuance of acts incapable of physical interruption and which the law gives no power to prevent." See also 22 Harv. Law Rev. 128: "The general adoption of such a rule (holding damage unnecessary) would entail a constant watchfulness by

equity will prevent its violation" as the most satisfactory method" of preventing the acquisition of an easement by prescription."

Legalizing nuisances. Since England has no written constitution Parliament has power to legalize any nuisance whatever; but the statutory authorization of a business is not construed as legalizing a nuisance if the business can be carried on without creating one.* In the United States such legislation is usually unconstitutional as within the prohibition against depriving a

land owners for possible future damage and much accompanying litigation. And in the absence of such caution prescriptive rights would so multiply as to impair seriously the development of property." On the other hand, see 13 Harv. Law Rev. 142: "While it is hard for one who at present does not wish to use his land in a certain way to be deprived of its future use, it is harder still for one committing the nuisance to be driven out of business simply because a neighboring proprietor decides to change his mode of occupation. It would be in the power of the latter to destroy at his option permanent and extensive works." See 12 Harv. Law Rev. 284.

**Amsterdam Knitting Co. v. Dean* (1900) 162 N. Y. 278, 56 N. E. 757, 1 Ames Eq. Cas. 573 (diversion of water): "Where the act complained of is such that by its repetition or continuance it may become the foundation or evidence of an adverse right, a court of equity will interpose by injunction, tho no actual damage is shown or found."

"But see *Dana v. Valentine* (1842) 5 Metc. 8: "And there seems to be no good reason to doubt, if the plaintiffs can maintain an action at law, they may obtain an adequate remedy without any interposition of a court of equity." Just what the court had in mind is not clear. The plaintiff could, of course, prevent the acquiring of an easement by suing at law just before the expiration of any statutory period.

"It seems to be well settled that no prescriptive right to maintain a public nuisance can be acquired. *Mills v. Hall* (1832) 9 Wend. (N. Y.) 315. Where, however, the nuisance is a purely private one, the rule seems to be that prescription does apply; *St. Helen's Smelting Co. v. Tipping* (1865) 11 H. L. C. 642. But, as pointed out by Wood, Nuisance Sec. 712, where the nuisance consists of polluting the atmosphere, as in *Campbell v. Seaman* (1876) 63 N. Y. 568, it is very difficult to establish a user for the requisite period.

**Shelfer v. City of London Lighting Co.* (1895) 1 Ch. D. 287, 1 Ames Eq. Cas. 589: "It is clearly for the defendants to prove, if they can, the truth of their assertion that it is impossible for them to carry on their business without creating a nuisance. . . . The defendants have

person of his property without due process of law or against taking private property for public use without compensation." It has been suggested, however, that such a prohibition applies only to grave and serious nuisances, and that small nuisances may be legalized as a proper exercise of the police power of the state." If the statute authorizing the nuisance is valid," both legal and equitable relief are barred.

Culpability of defendant. Liability for private nuisance dates back to a time when apparently all tort liability was absolute, not dependent upon any culpability or blameworthiness on the part of the defendant: "He that is damaged ought to be recompensed."⁴ This liability at peril has very largely persisted where injuries to property rather than injuries to the person have been concerned, irrespective of the form of action involved.* Hence a defendant may be liable for the creation of a nuisance tho done without his knowledge or consent by an independent

not proved that they cannot supply electricity properly if they multiply their stations and diminish the power of their engines at each station." See *State v. Board of Health* (1884) 16 Mo. App. 8, 12: "A nuisance is not the necessary result of burning brick; and where a nuisance is not the necessary result of the work authorized, legislative authority to create a nuisance will not be inferred from any license or authority to carry on the work, and legislative authority merely to carry on the work will not be a valid defense to a public prosecution or to a private action for a nuisance created in carrying it on."

⁴U. S. Constitutional Amendments 5 and 14. See *Sultan v. Parker-Washington Co.* (1906) 117 Mo. App. 636, 643, 93 S. W. 289; "Municipal authority for so great an annoyance (asphalt plant) will not legalize its existence, unless it is reasonably necessary for the common weal."

**Sawyer v. Davis* (1884) 136 Mass. 239: "Slight infractions of the natural rights of the individual may be sanctioned by the Legislature under the proper exercise of the police power, with a view to the general good."

⁴See 14 Col. Law Rev. 590, 610 as to the effect of legislation and state constitutional provisions authorizing the operation of railways.

⁴See *Basley v. Clarkson* (1681) 3 Levinz 37: "His intention and knowledge are not traversable; they cannot be known."

⁴See 59 U. of Pa. Law Rev. 298, 309, 310.

RELIEF AGAINST NUISANCES AND SIMILAR WRONGS 15

contractor who has been carefully selected." Where, however, the defendant is a vendee" of land upon which a nuisance has been already created" he becomes liable only upon principles of negligence," being entitled to a reasonable oppor-

"*Storrs v. Utica* (1858) 17 N. Y. 104 (constructing sewer through street.) And if the structure erected by the defendant does not prove to be a nuisance until later he is not entitled to any notice to abate; *Bowner v. Welborn* (1849) 7 Ga. 296: "Eo instante in which the use of his property becomes injurious to another, it is a nuisance and he is liable in damages. This liability depends upon no other fact or circumstances—if the nuisance exists, if the damage is proven, the law, without more, attaches to him the liability." See also *Vile v. Pa. R. R. Co.* (1914) 246 Pa. 35, 91 Atl. 1049. See *Matthews v. Mo. Pac. R. R.* (1887) 26 Mo. App. 75, 80 (erecting obstruction in public highway—liable without proof of negligence); *Haynor v. Excelsior Springs, etc. Co.* (1907) 128 Mo. App. 691, 697, 108 S. W. 580 (liable tho not negligent); *Martin v. St. Joseph* (1909) 136 Mo. App. 316, 321, 117 S. W. 96: "If the embankment proved a nuisance, . . . it was immaterial whether the city exercised due care etc."

"That the creator of the nuisance does not escape liability merely by selling or leasing his land, see *Plumer v. Harper* (1824) 3 N. H. 88. But a landlord is not liable for a nuisance created by his tenant unless he expressly or impliedly authorized it; *Edgar v. Walker* (1898) 106 Ga. 454, 32 S. E. 582. *Grogan v. Broadway Foundry Co.* (1884) 14 Mo. App. 587 (owner of premises demised to tenant for years not liable, for a nuisance created and maintained by tenant); *Padberg v. Kennerly* (1885) 16 Mo. App. 556 (landlord who renews a letting from month to month of premises upon which there is a nuisance, is liable); *Gilliland v. C. & A. R. R.* (1885) 19 Mo. App. 411, 416 (landlord liable if nuisance is such as necessarily arises from tenant's ordinary use of premises for purpose for which they were let and not avoidable by reasonable care on part of the tenant); *O'Brien v. Heman* (1915) 191 Mo. App. 477, 499, 177 S. W. 805 (landlord and tenant both liable); *Mancusco v. Kansas City* (1898) 74 Mo. App. 138, 144.

"Where the defendant has erected a nuisance on land belonging to a third party it is no defense that the defendant's removal of the nuisance will expose him to liability to such third party; *Thompson v. Gibson* (1841) 7 M. & W. 456.

"*Hayes v. Brooklyn Heights R. R. Co.* (1910) 200 N. Y. 183, 93 N. E. 409; *Hulett v. M. K. & T. R. R.* (1899) 80 Mo. App. 87, 90; *Graves v. R. R.* (1908) 133 Mo. App. 91, 98, 112 S. W. 736; *Wayland v. R. R.* (1862) 75 Mo. 548, 556.

tunity to abate the nuisance after knowledge of its existence."¹⁰

Where the damage caused to the plaintiff by a nuisance is purely personal—having no reference to any injured land¹¹—such as injuries to the health of persons having no property interests affected by the nuisance, there is a square conflict of authority as to whether defendant's liability is at peril¹² or only for negligence.¹³

¹⁰It is usually said that the grantee is entitled to notice to abate before becoming liable for the continuance of the nuisance; *Jones v. Williams* (1843) 11 M & W 176; *Pierson v. Glean* (1833) 14 N. J. Law 36; But apparently knowledge from any source would be enough; see *Leakan v. Cochran* (1901) 178 Mass. 56, 60 N. E. 382. Similarly, where an injunction has been issued against the previous owner's maintaining a nuisance, it would seem that the vendee should not be held guilty of contempt till he had knowledge of the injunction; 21 Harv. Law Rev. 220; criticising *State v. Porter* (1907) 76 Kan. 411; 91 Pac. 1073. *McGowan v. Mo. Pac. R. R.* (1886) 23 Mo. App. 203, 208; *O'Brien v. Burroughs Co.* (1915) 191 Mo. App. 501, 507, 177 S. W. 811.

¹¹Where the damage complained of is damage to land, the plaintiff must show some interest in the land; see *Müller v. Edison Elec. Illuminating Co.* (1901) 68 N. Y. Supp. 900; (lodgers in hotel disturbed by vibration). On the right of a reversioner to complain of a nuisance see 19 Harv. Law Rev. 541. If the defendant has acted intentionally or negligently in creating or maintaining a nuisance he is liable to any one injured thereby without reference to the plaintiff's interest in the land. *Clarke v. Thatcher* (1881) 9 Mo. App. 436, 438 (tenant from month to month not entitled to injunction). In *Whalen v. Baker* (1891) 44 Mo. 290 it was held that where land belonging to a wife is occupied by her and her husband as a home, the husband and not the wife is the proper party to bring an action for damages for a nuisance which does no permanent injury to the freehold.

¹²*Hosmer v. Republic Iron and Steel Co.* (1913) 179 Ala. 415, 60 So. 801 (noxious vapors caused death of young child who lived with his father.) And see *Fort Worth etc. R. R. v. Glenn* (1904) 97 Tex. 586, 80 S. W. 992 (an old well caused serious illness of young child who lived with his father). See also 13 Col. Law Rev. 433: "While this view presents somewhat of an extension of the strict common law conception of a nuisance, such an expansion in order to give a remedy to an infant, living with the parent on the latter's premises, seems thoroughly justifiable; for there appears to be no occasion for compelling an infant to leave his father's home to avoid the consequences of another's unlawful act, which is really an injury to the occupancy of the land."

¹³*Griffith v. Lewis* (1885) 17 Mo. App. 605, 612 (liability for percola-

Motive of defendant—"spite fences"—percolating waters. Since an easement of light and air may be acquired by prescription in England and the only way of preventing its being thus acquired is by erecting a structure which will shut off the light and air, the erection of any structure for this purpose is permissible; the motive for such an erection can be no bar because it is a beneficial use of the property to prevent the acquisition of an easement over it.⁴

In the United States an easement of light and air can not be acquired by prescription; but on the question of the validity of a structure which is of no beneficial use to the one erecting it, but has been erected from motives of spite, revenge, intimidation, etc., there is a conflict of authority.⁵ In some jurisdictions

tion of water from privy vault causing injury to health does not arise till after notice and a reasonable time to repair). *Ellis v. Kansas City etc. R. R.* (1876) 63 Mo. 131 (wife of lessee of premises made ill by nuisance); *Holley v. Boston Gas Light Co.* (1857) 8 Gray (Mass.) 123. (nine-year-old child injured by escape of gas). This view seems to be more nearly in accord with the historical development of the law of torts; see 26 Harv. Law Rev. 760.

⁴See *Chandler v. Thompson* (1811) 3 Campb. 80.

⁵For a collection of cases on each side, see *Letts v. Kessler* (1896) 54 O. St. 73, 42 N. E. 765: In that case the plaintiff alleged that the defendant was erecting a high board fence on his ground which would obstruct the windows of her hotel and deprive her of light and air, and that the fence was not being erected for any useful or ornamental purpose, but from motives of pure malice alone. Relief was refused. "As long as he keeps on his own property and causes an effect on her property which he has a right to cause, she has no legal right to complain as to the manner in which the effect is produced, and to permit her to do so would not be enforcing a rule of property but a rule of morals." But the better view and probably the weight of authority in this country is that one has no absolute right to erect useless structures on his land for the sole purpose of injuring others. *Burke v. Smith* (1888) 69 Mich. 380, 37 N. W. 838: "The right to breathe the air and enjoy the sunshine is a natural one; and no man can pollute the atmosphere or shut out the light of heaven for no better reason than that the situation of his property is

statutes have been passed making unlawful the building of such structures beyond a certain height," and such statutes have been held constitutional." If such structures are held unlawful either with or without a statute, equity will usually enjoin their erection or decree their removal, just as in other cases of private nuisance.

A similar situation exists as to malicious interference with percolating waters. English courts deny relief on the ground that a landowner has an absolute right to the percolating waters which he can intercept in his land and is not liable to an adjoining proprietor, regardless of the quantity of water taken, or the purpose to which it is applied." In this country, by the weight of authority, relief is given against such malicious interference upon the same principles that underlie the spite fence cases."

Joint actors—-independent actors. Where a nuisance is caused by several persons intentionally co-operating, each is liable for all the damage done and they may be sued separately or together either at law or in equity. Where, however, the nuisance is caused by several persons acting independently of each other, each is liable at law only for his share of the damage," and appar-

such that he is given the opportunity of so doing, and wishes to gratify his spite and malice toward his neighbor." See also 12 Col. Law Rev. 633-635; 25 Harv. Law Rev. 197. Even tho the structure has been erected from spite it is not considered unlawful if it serves a useful purpose. *Kusniak v. Kosminski* (1895) 107 Mich. 444, 65 N. W. 275 (building used as a woodshed).

"In Massachusetts, chapter 348 of statutes of 1887: "Any fence or other structure in the nature of a fence, unnecessarily exceeding six feet in height maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance."

"*Rideout v. Knox* (1889) 148 Mass. 368, 19 N. E. 390.

"*Acton v. Blundall* (1843) 7 M. & W. 324; 9 Col. Law Rev. 543.

"*Chesley v. King* (1882) 74 Me. 164. See *contra*, *Ellis v. Duncan* (1855) 21 Barb (N. Y.) 230; 9 Col. Law Rev. 543, 12 *id.* 633, 634.

"*Watson v. Colusa-Parrott Co.* (1904) 31 Mont. 513, 79 Pac. 14, defendant's smelting plant along with those of several others polluted the water and thus injured the plaintiff, a lower riparian proprietor. As the

ently each should be sued separately."⁴ And this liability exists, even tho the separate act of each one did not amount to a nuisance;⁵ in this latter situation, however, it has been held that the actors must be sued jointly and not separately.⁶

In any case where the defendants are liable to be sued jointly at law, there is, of course, no difficulty about joining them in a suit for an injunction.⁷ If they are liable only to separate suits at law, they are subject to separate suits in equity;⁸ but apparently the plaintiff may, if he prefers, join the independent actors in one suit, jurisdiction being usually placed upon the ground of avoiding a multiplicity of suits.⁹

court pointed out, the difficulty of apportionment was no defense whatever to an action at law.

⁴*Watson v. Colusa Parrott Co.*, *supra*. *Martinowsky v. City of Hannibal* (1889) 35 Mo. App. 70, 77.

⁵*Thorpe v. Brumfitt* (1873) 8 Ch. App. 650: "Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, tho the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on the way; that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defense to any one person among the hundred to say that what he did causes of itself no damage to the complainant." See also *Lambton v. Mellish* (1894) 3 Ch. 163; 4 Col. Law Rev. 367.

⁶*Hillman v. Newington* (1880) 57 Cal. 56, diversion of water by several upper proprietors so that the aggregate diversion caused a nuisance.

⁷*Hillman v. Newington*, *supra*.

⁸*Lambton v. Mellish*, *supra*. The English practice seems to be to bring separate suits and have them tried together. See 7 Col. Law Rev. 57, 59.

⁹See *Warren v. Parkhurst* (1906) 186 N. Y. 45, 78 N. E. 579; 7 Col. Law Rev. 57.

Whether issue at law must first be directed. The early rule was that before a plaintiff could get a perpetual injunction against a trespass he must first establish his right at law if there was a dispute in regard to it." This rule was later abolished in England and modified in this country; but it apparently has not disappeared tho the reasons for its existence no longer prevail."

"Logically one would expect that courts of equity would give a remedy in all cases where the common law remedy is not adequate, just as in cases of waste; but the early rule was that if the defendant disputed the plaintiff's title or in any other way claimed a right to do the act threatened, the mere fact that there was a dispute precluded equitable relief. In *Pillsworth v. Hopton* (1801) 6 Ves. 51 Lord Eldon said: "I remember perfectly being told from the bench very early in my life that if the plaintiff filed a bill for an account, and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction." At that time there were two fairly adequate reasons for the rule. One was that the method of trial by deposition in equity courts was not as satisfactory for dealing with complicated questions of property or torts as a trial in open court which is the normal method under the common law. This has disappeared practically everywhere, equity suits being tried in much the same way as common law actions are tried, the equity judge even considering himself bound by common law rules of evidence tho their existence is to be justified almost entirely by the method of trial by jury. The other was that at that time in England the Chancery court sat only at Westminster while common law courts sat in various parts of the country; hence after the method of trial had been changed and witnesses were examined in open court it would cause a great expense to have them all come to London. At the present time, in probably every Anglo-American jurisdiction, courts of equity are as accessible to suitors as are common law courts.

"With the disappearance of the reasons for the rule, the rule itself should have disappeared because it was not a limit upon the existence of equity jurisdiction but merely upon its exercise as a matter of convenience and expediency. But the reasons for the rule were not well understood and hence the rule in modified form still persists in probably the large majority of jurisdictions. As modified the rule is substantially as follows: If there is a *bona fide* and reasonable dispute as to title, equity will give a temporary injunction to preserve the *status quo* till the legal right can be settled at law; if the defendant is in possession the burden will be upon the plaintiff to establish his title by bringing ejectment and

The early rule¹ requiring that in suits to enjoin a nuisance an issue be first directed to try the question whether the nuisance alleged was in fact² such, has had much the same development."

it will be necessary for him to make out a more serious case for equitable relief than if the defendant were not in possession. If the plaintiff is in possession and the defendant has actually committed a trespass the burden will be upon the plaintiff to test his legal right by an action of trespass *quare clausum*, but if the defendant has merely threatened a trespass the burden will be upon the defendant to bring ejectment. If the holder of a particular estate is in possession the plaintiff cannot, of course, bring trespass; but he can bring an action on the case if he can show an injury to his reversionary interest; if there is an injury to his reversionary interest the burden will be upon him to establish his title by bringing such an action on the case; if there is no injury to his reversionary interest and none is threatened, he does not need an injunction.

¹*Weller v. Smeaton* (1784) 1 Brown Ch. 572. 1 Ames Eq. Cas. 554; *Elmhurst v. Spencer* (1849) 2 MacN. & G. 45. But see *Bush v. Western* (1720) Precedents in Ch. 530, 1 Ames Eq. Cas. 553. *Arnold v. Klepper* (1857) 24 Mo. 273, 277. In *Welton v. Martin* (1842) 7 Mo. 307, 311 the court gave as one reason for refusing relief that the plaintiff had not established his right at law (obstruction of private water course). See also *Baker v. McDaniel* (1903) 178 Mo. 447, 468, 77 S. W. 531.

²"Since in the narrow sense a nuisance does not involve any violation of the plaintiff's possession, questions of the plaintiff's title are not raised; in this respect a suit to restrain a nuisance resembles a suit to stay waste rather than a suit to enjoin a trespass; hence as a matter of logic one might have expected that there would be no requirement of directing an issue at law in suits to enjoin a nuisance just as there is no such requirement in suits to stay waste. But the jurisdiction of equity over nuisance is of a later development than that over waste and in the meantime the rule in trespass cases had grown up; and since nuisance is superficially more like trespass than waste it is not surprising that the trespass rule should be adopted. See 22 Harv. Law Rev. 65, reviewing 56 U. of Pa. Law Rev. 290-315: "Injunctions against Nuisances and Rule Requiring the Plaintiff to Establish his Right at Law." See the odd remark in *Carpenter v. Grisham* (1875) 59 Mo. 247, 250, that the requirement is more particularly applicable to nuisance than to trespass.

"At the present time the rule does not apply where the alleged nuisance is clearly shown; *Turner v. Mirfield* (1865) 34 Beav. 390, 1 Ames Eq. Cas. 409. Where the court does direct an issue, it will usually give

Unless the rule has been definitely repudiated by judicial decision, it should be abrogated by statute."

Balance of convenience—preliminary injunctions. Where a preliminary injunction is sought against a nuisance it is well settled that in deciding whether or not to give it the court will balance the inconvenience to the defendant if relief should be given against the inconvenience to the plaintiff if relief should be denied. As was observed in *Crowder v. Tinkler*, "great caution is required in granting an injunction of this nature where the effect will be to stop a large concern in a lucrative trade."

a temporary injunction to maintain the status quo till the issue is decided: *Pollock v. Lester* (1853) 11 Hare 266; *Longwood Valley R. R. v. Baker* (1876) 27 N. J. Eq. 166. In *Soltan v. De Held* (1851) 2 Simon (N. S.) 133 it was held that the defendant is not entitled to have an issue directed more than once; he cannot, by reducing the amount of noise (bell ringing) entitle himself to insist upon having a jury determine whether the ringing bell is now a nuisance. *Hayden v. Tucker* (1860) 37 Mo. 214, 222 (only necessary where a question of title involved or the right itself is doubtful or uncertain; a purchaser of land is entitled to an injunction tho the nuisance was in existence before he purchased); *Harrelson v. R. R.* (1899) 151 Mo. 482, 500, 52 S. W. 368; "In a clear case a court of equity will grant relief without waiting for the slow process of law." In *McNulty v. Miller* (1912) 167 Mo. App. 134, 151 S. W. 208 relief was given, tho there had been no trial at law. In *Atterbury v. West* (1909) 139 Mo. App. 180, 186, 122 S. W. 1106; "Since the decision in that case (*Paddock v. Somes* (1890) 102 Mo. 226, 240, 14 S. W. 746) the courts are holding that it is not necessary to first establish the fact of the existence of the nuisance by the court of law, etc." In *Getz v. Amsden* (1907) 125 Mo. App. 592, 596, 102 S. W. 1037, "his right must be clear and the injury established, as in doubtful cases the party will be turned over to his legal remedy." But see *Shelton v. Cummins* (1916) 189 S. W. 1190.

"See 56 U. of Pa. Law Rev. 290, 315.

"(1816) 19 Ves. 617, 1 Ames Eq. Cas. 555 (suit to prevent the defendants from using a new building as a powder magazine).

"In *Eaden v. Firth* (1803) 1 H. & M. 573, 1 Ames Eq. Cas. 564, the court refused a preliminary injunction against the operation of a large steam hammer: "The question is, whether the balance of convenience is in favor of or against the issue of an interlocutory injunction. If I found any real apprehension of serious and immediate injury to health

And where the decree sought is affirmative rather than negative it is usually considered that still more caution should be used. In *Herbert v. Penn. R. R. Co.*¹⁸ the defendant railroad had made such a large embankment on its own land as to cause irregular upheavals of the plaintiff's adjacent lot. The court refused a preliminary affirmative decree: "A mandatory injunction should be issued interlocutorily with hesitation and caution, and only in an extreme case where the law plainly does not afford an adequate remedy. It does not with certainty appear that further injury will result to the complainant from the embankment or the further filling upon it. . . . In such a condition . . . the court should not, by its mandatory injunction compel the defendant to expend thousands of dollars in destroying that which it has expended so much in building up, and under such circumstances the court should not, by its preventive injunction, stop the completion of a work upon which so much has been expended and which will be of as great public benefit as it appears this will be." ¹⁹

Same—existence of nuisance. Unless the plaintiff is complaining of an interference with what the law regards as a technical property right,²⁰ it is necessary to show substantial damage

or of any pressing character of the like nature (such as the cases of stench or of apprehended inundation), I would interfere to prevent such irreparable injury in the mean time; but in this case I see nothing except annoyance apprehended by the plaintiff; and I certainly think that on the question of balance of convenience I ought to refuse the injunction." See also *Maloney v. Katzenstein* (1909) 120 N. Y. Supp. 418 where such relief was refused because of the hardship it would cause defendant who had without objection carried on the alleged offensive business for nineteen years.

¹⁸(1887) 43 N. J. Eq. 21, 10 Atl. 872.

¹⁹See also *Robinson v. Byron* (1785) 1 Brown, Chanc. Cases, 588; *Longwood Valley R. R. v. Baker* (1876) 27 N. J. Eq. 166. In *Hepburn v. Lordan* (1865) 2 H. & M. 345 the defendant was compelled at once to remove some damp jute because of the slight cost of such removal compared with the enormous damage which the plaintiffs would suffer if a fire should be caused by its spontaneous combustion.

²⁰See *ante* p. 11.

in order to prove a nuisance;" and unless the damage consists of a direct injury to property," the question of the existence of a nuisance involves a consideration of the relative convenience of the plaintiff, the defendant and the public. The question has usually been raised in cases where the plaintiff has chosen to live in a community devoted largely to industry. In *Gilbert v. Showerman*" the plaintiff sought to enjoin the running of a flour mill near the building in which he lived. In denying an injunction Cooley, J. said: "The right to have such a business restrained is not absolute and unlimited, but is, and must be in the nature of things, subject to reasonable limitations which have regard to the rights of others not less than to the general public welfare." . . . The defendants are carrying on a business

"See *ante* p. 9.

"*St. Helen's Smelting Co. v. Tipping* (1865) 11 H. L. C. 642: "It is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurred. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. . . . But when an occupation, or business is a material injury to property then there unquestionably arises a very different consideration." It must be confessed that it is not always easy to draw the distinction which the learned judge insists upon; see 7 Col. Law Rev. 550.

"(1871) 28 Mich. 448.

"*Rushman v. Polsue and Alfieri* (1906) 1 Ch. 234: "The views that the standard of what amount of freedom from smoke, smell and noise a man may reasonably expect will vary with the locality in which he dwells seems to be confirmed by the following passage in Lord Hals-

not calculated to be especially annoying, except to occupants of dwellings. They chose for its establishment a locality where all the buildings had been constructed for purposes other than for residence. Families, to some extent, occupied these buildings, but their occupation was secondary to the main object of their construction, and we must suppose that it was generally for reasons which precluded the choice of a more desirable neighborhood. . . . The complainant, having taken up his residence in a portion of the city mainly appropriated to business purposes, cannot complain of the establishment of any new business near him, provided such new business is not in itself objectionable as compared with those already established, and is carried on in a proper manner."⁸⁸

bury's judgment in *Colls v. Home & Colonial Stores* (1904) A. C. 179: "A dweller in town cannot expect to have as pure air, as free from smoke, smell and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell and noise may give cause for action, but in each of such cases it becomes a question of degree and the question is in each case whether it amounts to a nuisance which will give a right of action." See 19 Harv. Law Rev. 474; 6 Col. Law Rev. 458. See *Bradbury Marble Co. v. Laclede Gaslight Co.* (1907) 128 Mo. App. 46, 107, 106 S. W. 594; *Gibson v. Donk* (1879) 7 Mo. App. 37, 40; *Morie v. St. Louis Transit Co.* (1905) 116 Mo. App. 12, 27, 91 S. W. 962.

⁸⁸A plaintiff who is compelled, because of comparative poverty, to live outside the purely residential districts, is not, however, deprived of all protection. In *Ross v. Butler* (1868) 19 N. J. Eq. 294 the plaintiff sought to enjoin the erection of a pottery to burn earthenware because it would produce a large amount of smoke and cinders; one defense was that the locality was occupied principally by mechanics and laborers who used their houses and lots for business purposes. In giving relief: "I find no authority that will warrant the position that a part of a town which is occupied by tradesmen and mechanics for residences and carrying on their trades and business, and which contains no elegant or costly dwellings, and is not inhabited by the wealthy and luxurious is a proper and convenient place for carrying on business which renders the dwellings there uncomfortable to the owners and their families by offensive smells and smoke, cinders, or intolerable noises, even if the inhabitants themselves are artisans, who work at trades occasioning some

Same—adequacy of damages. Even tho the act complained of amounts to a nuisance so that damages are recoverable at law, an injunction is occasionally refused as a matter of discretion, taking into consideration the relative inconvenience suffered by giving or denying relief. In *Swaine v. Great Northern Ry. Co.*¹⁰ the plaintiff asked an injunction against the defendant's leaving manure in stacks or in cars on their sidetrack close to the plaintiff's house. In remitting the plaintiff to his remedy at law: "It is not every case that the court will interfere by injunction. . . . Occurrences of nuisances, if temporary and occasional only, are not grounds for the interference of this court by injunction, except in extreme cases; there is not . . . here a sufficient case for such interference."¹¹

Same—perpetual injunction. Where the act complained of is proved or admitted to be a nuisance and where furthermore, damages therefor are conceded to be inadequate, it would seem to follow logically that the plaintiff is entitled to a perpetual injunction as of right, regardless of any further question of balancing conveniences. This is probably the prevailing rule.¹² But

degree of noise, smoke and cinders. . . . There is no principle . . . which should give protection to the large comforts and enjoyments with which the wealthy and luxurious are surrounded, and fail to secure to the artisan and laborer, and their families, the fewer and more restricted comforts which they enjoy."

¹⁰(1864) 4 DeG., J. & S., 1 Ames Eq. Cas. 569.

¹¹See also *Cook v. Forbes* (1869) 5 Eq. Cas. 166; *Giotlich v. Klein & Cohn* (1909) 32 O. Cir. Ct. 665 (injunction refused against the operation of hammers and heavy machinery). In *Robinson v. Baugh* (1875) 31 Mich., 290, the fact that the defendant's blacksmith shop was on leased ground under a short term and the machinery was easily removable made it easier for the court to give equitable relief. *Foundry v. R. R.* (1908) 130 Mo. App. 104, 116, 109 S. W. 80; *Victor Mining Co. v. Morning Star Mining Co.* (1892) 50 Mo. App. 525, 534 (removal of lateral support; injunction refused); *Schopp v. Schopp* (1911) 162 Mo. App. 558, 565, 142 S. W. 740.

¹²*Broadbent v. Imperial Gas Co.* (1856) 7 DeG., M. & G. 436, 462: "The present is not a case in which this court can go into the question of convenience and inconvenience, and say where a party is substantially damag-

in some jurisdictions courts have refused injunctions in such cases because of the comparatively great hardship on the defendant if an injunction were granted, especially if there would also result hardship to the public. In *Richards' Appeal*^m the plaintiff sought to enjoin the defendant from using soft coal in their puddling furnaces because the smoke discolored the plaintiff's fabrics in his cotton factory, and rendered his residence uncomfortable. The defendant's works had cost over half a million dollars, nearly a thousand persons were employed; it was practically impossible to run their furnaces without soft coal and no way had yet been found of avoiding the escape of smoke. The court denied the relief sought: "Especially should the injunction be refused if it be very certain that a greater injury would ensue by enjoining than would by a refusal to enjoin. . . .

Hence the chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing and leaving the party to his redress at the hands of a court and jury."^m

ed, that he can only be compensated by bringing an action *toties quoties*. That would be a disgraceful state of law; and I quite agree with the Vice-Chancellor, in holding that in such a case this court must issue an injunction, whatever may be the consequences with regard to the lighting of the parishes and districts which this company supplies with gas." See also *Hennesy v. Carmony* (1892) 50 N. J. Eq. 616, 25 Atl. 374, 1 Ames Eq. Cas. 578; *Whalen v. Union Bag & Paper Co.*, (1913) 208 N. Y. 1, 101 N. E. 805; 13 Col. Law Rev. 635; 14 Harv. Law Rev. 149; 22 *Id.* 458; 18 *Id.* 596, 613; 25 *Id.* 474.

^m(1868) 57 Pa. 105, 1 Ames Eq. Cas. 574.

ⁿIn *Daniels v. Keokuk Water Works* (1883) 61 Ia. 549, 16 N. W. 706, 1 Ames Eq. Cas. 585, emphasis was laid upon the public inconvenience which would result from an injunction. For other cases denying an injunction because of the "balance of convenience" doctrine, see 14 Harv. Law Rev. 458, 623, 22-*Id.* 596, 613, criticising *Bliss v. Anaconda Mining Co.* (1908) 167 Fed. 342; 22 Harv. Law Rev. 61, criticising *Somerset Water etc. Co. v. Hyde* (1908) 129 Ky. 402, 111 S. W. 1105; 57 U. of Pa. Law Rev. 396, criticising *McCarthy v. Bunker Hill etc Co.* (1908) 164 Fed. 927. In *City of Wheeling v. Natural Gas Co.*, (1914) 74 W. Va. 372, 81 S. E. 1067 the court refused to enjoin a gas company from

The criticism of the prevailing view is that it allows the plaintiff to charge the defendant an exorbitant price for his property.¹⁰ Unless, however, the plaintiff has bought the property with that as his sole motive, this is considered as one of the legitimate incidents of ownership.¹¹ And the defendant can usually protect himself at the outset by buying up sufficient land to prevent the question from being raised.¹² The result of the minority holding is that the plaintiff is remitted to his legal remedy; if he recovers only for damages down to the date of bringing his action, he will be compelled to sue just before the close of each statutory period¹³ in order to prevent the acquisition of an easement; if he recovers prospective damages, the defendant acquires by the judgment against him such an easement at once. This in substance allows the defendant to take the plaintiff's

supplying gas in violation of its franchise because of the inconvenience it would cause the public. 28 Harv. Law Rev. 110. And the doctrine has occasionally been applied in trespass cases; 28 Harv. Law Rev. 209.

¹⁰See 22 Harv. Law Rev. 596, 597.

¹¹In *Edwards v. Allouez Mining Co.* (1878) 38 Mich. 46, 1 Ames Eq. Cas. 608, the defendants in 1874 had erected a copper stamp mill at a cost of \$60,000. As a result of its operations, large quantities of sand were carried down stream and deposited on bottom lands below; it was impossible to run at a profit unless they were allowed to do this. In 1875 the plaintiff bought the land below, not for use but as a matter of speculation expecting to compel the defendants to pay a large price; for this reason an injunction was refused, and the plaintiff remitted to his rights at law. But see *Cowper v. Laidler* (1903) 2 Ch. 337, where the plaintiff's motive in purchasing was held no bar in case of disturbance of an easement of light and air.

¹²See 14 Harv. Law Rev. 458, 459.

¹³In *Attorney General v. Council and Borough of Birmingham* (1858) 4 K. & J. 528, 540, the court seemed to think that a plaintiff "would be obliged to bring a series of actions one every day of his life." There seems to be no sound basis for such a suggestion. *Hayden v. Tucker* (1866) 37 Mo. 214, 224: "Why compel the party to commence a fresh action every day to establish each separate act of nuisance, when the whole can be finally concluded and set at rest by the chancellor, etc."

property by a sort of private eminent domain;" and while it can not be plausibly argued that the refusal of a court of equity to grant an injunction is a violation of the fifth and fourteenth amendments to the United States Constitution which impliedly prohibit either the Federal or the State government from the taking of private property for private use even with compensation," it is inconsistent with the spirit of these amendments" unless the public interest in the defendant's enterprise is so great as to make it in substance a taking for a public use."

"See 25 Harv. Law Rev. 474.

"*Quære* as to whether legislation, which gives equity courts power to award damages in lieu of an injunction in order to avoid the necessity of the plaintiff's suing at law, is a violation of the letter of the amendments. See *Hennesy v. Carmony* (1892) 50 N. J. Eq. 616, 1 Ames Eq. Cas. 578: "And of the English cases it is proper further to observe that some of them gave damages instead of an injunction, under the authority of the acts of Parliament for the purpose, called Lord Cairns and Sir John Rolt's acts. The giving of damages for continuing nuisances is quite within the omnipotent power of Parliament, which is competent to take private property for private purposes. In this country, under our constitutional system, that course is forbidden."

"See 13 Col. Law Rev. 635, 636: "The result of the denial of an injunction in such cases is the same whether the plaintiff is driven to pursue his remedy at law, or whether the legislature vests in the courts the power to exercise discretion in awarding damages instead of an injunction. It results in a forced sale of individual rights at private valuation."

"It has been suggested that if there is such a great public interest the proper course is to require the defendant to make the proper constitutional condemnation. See 12 Col. Law Rev. 635, 637; 57 U. of Pa. Law Rev. 396, 398; 22 Harv. Law Rev. 596, 597. But under the rather restricted notion of what constitutes a public purpose under the amendments, it is not clear that a legislature may authorize large private industrial plants to take property by eminent domain. The best solution to the whole difficulty would be to liberalize and broaden our definition of public purpose so that the legislature may authorize such proceedings. This would approximate the situation in this country to that in England where Parliament may even authorize the taking of private property for a purely private use.

II DISTURBANCE OF PRIVATE EASEMENTS.

Private easements distinguished from natural rights—remedies. A private easement has been defined⁹⁸ as "a right in one person, created by grant or its equivalent, to do certain acts on another's land, or to compel such other to refrain from doing certain acts thereon, the right generally existing as an accessory to the ownership of neighboring land, and for its benefit." Easements differ from natural rights in that they are created separately⁹⁹ as distinct subjects of property, while natural rights are mere incidents to the ownership of land. For a disturbance or interference with the proper exercise of an easement,¹⁰⁰ either by the owner of the servient tenement or by a third person, the common law remedy¹⁰¹ is an action on the case¹⁰² for damages. Where this is not adequate equity grants relief by either a negative or affirmative decree.

In most of the cases¹⁰³ in which equitable relief has been

⁹⁸Tiffany, Real Property sec. 304.

⁹⁹Either by voluntary act of the parties or by prescription.

¹⁰⁰The disturbance of a private easement is frequently referred to as a private nuisance; see 9 Ill. Law Rev. 278-281; *Morgan v. Boyes* (1875) 65 Me. 124.

¹⁰¹The common law also allowed the aggrieved person to abate the obstruction; *Sargent v. Hubbard*. (1869) 102 Mass. 380 (cutting branch that obstructed private way); but unnecessary damages must be avoided; *Joyce v. Conlin* (1888) 72 Wis. 607, 40 N. W. 212.

¹⁰²Trespass does not lie because the occupier of the dominant tenement was not considered as being *possessed* of the easements.

¹⁰³Tiffany, Real Property sec. 304 names the following easements as most important: "Rights in extension or diminution of natural rights in regard to air, water, and support; rights of way over another's land; rights as to the use of a party wall in part or wholly on another's land; rights to have light and air pass to one's windows without obstruction; pew rights in churches and burial rights in cemeteries." Equity will also enjoin the wrongful interference with a profit or similar right; *State ex rel. v. Goodrich* (1911) 238 Mo. 720, 142 S. W. 300 (contractual right to cut and remove timber from land). See also *Harber v. Evans* (1890) 101 Mo. 661, 668, 14 S. W. 750 (defendant restrained from putting windows in party wall though plaintiff did not intend to use wall.)

granted the easement disturbed has been either one of light and air, right of way or right of access to a public way.

Light and air. The mere fact that an action at law will lie for interference with an easement of light and air³⁰² is not a sufficient reason for an injunction.³⁰³ On the other hand, the fact that the obstruction does not interfere with the plaintiff's present use of the premises for which strong light is not required is no defense to a suit for an injunction if the threatened obstruction would substantially interfere with any lawful business.³⁰⁴ Nor is it material that the plaintiff bought the property as an investment without intending to occupy it himself.³⁰⁵ But if the obstruction is temporary and easily removable, and the premises are occupied by tenants, the landlord may fail to get an injunction because there is no damage to his interest in the land, tho the tenants themselves would have been entitled to equitable relief.³⁰⁶

³⁰²Easements of light and air are quite common in England because they can there be acquired by prescription. This part of the English common law was rejected in America as inapplicable to a new country, and easements of light and air by grant are comparatively rare.

³⁰³*Attorney General v. Nichol* (1809) 16 Vesey 338, 1 Ames Eq. Cas. 534 (affidavit did not state the amount which the plaintiff's windows would be darkened by the obstruction). See also *Jackson v. Duke of Newcastle* (1864) 3 DeG. J. & S., 275. In *Martin v. Price* (1893) 1 Ch. 276, 1 Ames Eq. Cas. 537 the defendant had pulled down a house and was in the process of erecting a new building some twenty-five feet higher. Since this would cause the plaintiff substantial deprivation of light he was given an injunction. In *Home & Colonial Stores L'd. v. Colls* (1902) 1 Ch. D. 302 the "true rule of law" was stated to be: "If ancient lights are interfered with substantially, and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief." An injunction was given in *St. Louis etc. Co. v. Kennet's Est.* (1903) 101 Mo. App. 370, 397, 74 S. W. 474 (smoke stack and oriel windows).

³⁰⁴*Yates v. Jack* (1866) 1 Ch. App. 295, 1 Ames Eq. Cas. 541, *semble*. See 4 Harv. Law Rev. 193.

³⁰⁵*Wilson v. Townsend* (1860) 1 Drewry & Smale 324, 1 Ames Eq. Cas. 539.

³⁰⁶*Jones v. Chappell* (1875) 20 Eq. Cas. 539. The rule is similar in case of private nuisance; *Simpson v. Savage* (1856) 1 C. B. (N. S.) 347.

There is, of course, more reluctance in granting affirmative than in granting negative decrees; but affirmative relief has been frequently granted not only on the final decree¹⁰⁷ but also on motion.¹⁰⁸ If after notice that an injunction will be sought the defendant has continued erecting the obstruction, such continuance will not place him in any better situation with respect to equitable relief.¹⁰⁹

Right of way. One who has a private right of way is entitled to equitable relief against either an actual¹¹⁰ or threatened

¹⁰⁷*Smith v. Smith* (1875) 20 Eq. Cas. 500, 1 Ames Eq. Cas. 543 (defendant had torn down an old wall nine feet high and erected a new one twenty-six feet high.) In *Calcraft v. Thompson* (1867) 15 Weekly Rep. 387 affirmative relief was refused because the plaintiff had failed to show that there would be a substantial deprivation of light. In *Brande v. Grace* (1891) 154 Mass. 210, 31 N. E. 633, the plaintiffs had sought to enjoin their lessor from building another room in front of the room leased and occupied by the plaintiffs as a dental office; the appeal court held that the lower court should have given the injunction but that since the work had been completed and the plaintiffs' lease would soon expire, their remedy should now be confined to damages.

¹⁰⁸*Ryder v. Bentham* (1750) 1 Ves. Sr. 543, 1 Ames Eq. Cas. 545 (scaffold ordered removed.)

¹⁰⁹*Smith v. Day* (1880) 13 Ch. D. 651; *VanJoel v. Hornsey* (1895) 2 Ch. 774, 1 Ames Eq. Cas. 546: "The court will not allow itself to be imposed upon by a proceeding of that kind." See also *Daniel v. Ferguson* (1891) 2 Ch. 27.

¹¹⁰*Stallard v. Cushing* (1888) 70 Cal. 472, 18 Pac. 427 (stairway placed by defendant in plaintiff's private alley;); *Shivers v. Shivers* (1880) 32 N. J. Eq. 578 (gate placed by defendant across plaintiff's right of way obtained by prescription). Most of the cases are of affirmative decrees against actual obstructions. In jurisdictions which reject the doctrine of balance of convenience the plaintiff is entitled to an affirmative decree even tho it will cause great expense to the defendant; *Krehl v. Burrell* (1878) 7 Ch. D. 551 (court ordered removal of large building obstructing passage way to the back of plaintiff's house). Continuing to build after notice of the plaintiff's claim does not place the defendant in any better situation with reference to equitable relief against him. *Tucker v. Howard* (1880) 129 Mass. 361, 1 Ames. Eq. Cas. 548. *Swisher v. C. & A. R. R.* 235 Mo. 420, 441 (plaintiff had a right of way ten feet wide and defendant had obstructed it so as to make it only six feet ten inches wide); *Sultzman v. Branham* (1907) 128 Mo. App. 696, 701, 108

interference therewith; and where the circumstances of the case require it, an affirmative decree will be given on motion.¹³³

Where the obstruction has been caused independently by several defendants the plaintiff is entitled to a decree against all even tho the share contributed by any one would not have been enough by itself to warrant either an action at law or an equitable decree.¹³⁴

In some jurisdictions if the defendant disputes the plaintiff's right and raises thereby a reasonable doubt, an issue at law will first be directed to determine the existence of the easement unless there is danger of serious injury.¹³⁵ As already explained, the real reasons for such a requirement have disappeared and the requirement itself should be abolished.¹³⁶

A reversioner is entitled to equitable relief where the ob-

S. W. 1074 (threatened obstruction of passage way). In *Brier v. Bank* (1909) 225 Mo. 673, 683, 125 S. W. 469 the court refused to order the removal of the obstruction to the plaintiff's stairway because "there is no averment that any future injury is anticipated or threatened." The mere fact that the obstruction is already completed does not, however, prevent its causing injury in the future.

If the plaintiff fails to prove the existence of an easement, he will of course, fail; *Peters v. Worth* (1901) 164 Mo. 431, 439, 64 S. W. 490; *Lentz v. Johnson* (1911) 157 Mo. App. 483, 137 S. W. 1002.

Conversely, the owner of the servient tenement may enjoin an unauthorized excessive use of the right of way; *Bruner Granitoid Co. v. Glencoe etc. Co.* (1912) 169 Mo. App. 295, 300, 152 S. W. 601. But a licensee has no such interest in the land as will entitle him to equitable relief; *Cook v. Ferbert* (1898) 145 Mo. 462, 465, 46 S. W. 947.

¹³³*Hodge v. Glese* (1887) 43, N. J. Eq. 342, 11 Atl. 484 (decree required defendant to allow the plaintiff to pass through the defendant's barber shop to the furnace which supplied heat to the plaintiff's rooms on the two floors above.)

¹³⁴*Thorpe v. Brumfitt* (1873) 8 Ch. App. 650, 1 Ames. Eq. Cas. 547 (plaintiff's right of way to his inn obstructed by horses and wagons belonging to several defendants).

¹³⁵*Hart v. Leonard* (1880) 42 N. J. Eq. 416, 1 Ames Eq. Cas. 549. See also 10 Col. Law Rev. 355.

¹³⁶See ante pp. 20-22.

struction causes a substantial injury to the reversioner's interest in the land.³²⁶

Land occupier's right of access to public way. If the owner of land adjoining a public way owns to the middle of the way, one in possession of the land may maintain an action of trespass against the use of that part of the way in a manner not authorized by the public easement, and if trespass is not an adequate remedy, he may get relief in equity.³²⁷ But if the fee of the way is in the municipality, the adjoining land occupier has only an easement of access to the way. If this easement is obstructed he is entitled to damages in an action on the case and if damages are not adequate, he is entitled to equitable relief. In *West v. Brown*³²⁸ the defendant had been allowing his hacks to stand for an unreasonable length of time in front of the plaintiff's

³²⁶*Webb v. Jones* (1909) 163 Ala. 637, 50 So. 887; 10 Col. Law Rev. 355, 364 (right of way to plaintiff's farm obstructed by wire fence; the farm was rented to a tenant but the plaintiff's free access to the farm was interfered with and the market value of the property diminished thereby).

³²⁷In *American Manufacturing Co. v. Lindgren* (1912) 48 N. Y. L. J. 19 the defendant had been making speeches in front of the plaintiff's factory, vilifying the owners and urging the workers to strike. The plaintiff could have brought trespass because they owned the fee of the street but such a remedy would have been obviously inadequate and therefore it was held proper to issue an injunction.

³²⁸(1897) 114 Ala. 118, 21 So. Rep. 452, 11 Harv. Law Rev. 130. See also *Ackerman v. True* (1902) 71 App. Div. 413, where the defendant was compelled to remove some houses which so projected into the street as to interfere with plaintiff's access to an adjoining lot. 2 Col. Law Rev. 559. There is a tendency to confuse this right of access with the rather similar right of individuals to get relief against the obstruction of a public easement. In *Callahan v. Gilman* (1887) 107 N. Y. 310, 14 N. E. 264, the defendant had so obstructed the sidewalk in front of the plaintiff's store as to interfere with the plaintiff's trade. In very properly giving relief the court speaks of the defendant's act as a public nuisance tho obviously the plaintiff's injury is due to blocking his right of egress and ingress to his store. See also 28 Harv. Law Rev. 499, 500, 6 Col. Law Rev. 203. *Downing v. Dinwiddie* (1895) 132 Mo. 92, 100, 33 S. W. 470, 575; *Corby v. C. R. I. & P. R. R.* (1899) 150 Mo. 457, 468, 52 S. W. 282.

hotel, thus obstructing the right of access of the plaintiff and his guests, to the injury of the plaintiff's business. Damages being obviously inadequate,¹²² the plaintiff was given a decree.¹²³

¹²²In *Herbert v. Pennsylvania R. R. Co.* (1887) 43 N. J. Eq. 21, 10 Atl. 872, the defendant had made a large embankment on its own land which caused irregular upheavals of the plaintiff's nearby lot and obstructed access. Tho damages were not adequate, relief was denied on the ground that the balance of convenience was against it.

¹²³Apparently the land occupier not only has a right of access to the adjacent street but also has a right to an unobstructed view of the street. *Cobb v. Sarby* (1914) 3 K. B. 822 (defendant's sign board projected over the street in such a manner as to obscure the view from the plaintiff's side wall, which he used for advertising). In 28 Harv. Law Rev. 499 it is suggested that such a right might be called the right of publicity and that it is more analogous to an easement of light and air than to an easement of access because only a substantial obstruction of the view should be actionable. *Lakeman v. R. R.* (1889) 36 Mo. App. 363, 373; *Downing v. Corcoran* (1905) 112 Mo. App. 645, 649, 87 S. W. 114; *Lockwood v. Wabash Ry.* (1894) 122 Mo. 86, 100, 26 S. W. 698 (railroad in street); *Corby v. C. R. I. & P. R. R.* (1899) 150 Mo. 457, 468, 52 S. W. 282 (railroad in alley); *Zimmerman v. Ry. Co.* (1910) 154 Mo. App. 296, 302, 134 S. W. 40; *Watson v. Ry. Co.* (1897) 69 Mo. App. 548, 552 (right to exclusive temporary use of the whole or part of adjacent street for reasonable space of time for receiving and discharging freight necessary to his business); *Sheedy v. Union Brick Works* (1887) 25 Mo. App. 527, 539 (action for damages); *Martin v. R. R.* (1891) 44 Mo. App. 452, 457 (action for damages); *Wallace v. R. R.* (1891) 47 Mo. App. 491, 498 (action for damages); *Rabich v. Stone* (1909) 137 Mo. App. 318, 321, 117 S. W. 1195 (affirmative relief given); *Downing v. Dinwiddie* (1895) 132 Mo. 92, 100, 33 S. W. 1130; *Hulett v. Ry.* (1899) 80 Mo. App. 87, 91; *Weller v. Lumber Co.* (1913) 176 Mo. App. 243, 253, 161 S. W. 853 (access to navigable stream); *In re Heffron* (1913) 179 Mo. App. 639, 655, 162 S. W. 652 (sidewalk obstructed by strikers); *Schopp v. City of St. Louis* (1893) 117 Mo. 131, 137, 22 S. W. 898 (injunction given against city leasing stands in front of plaintiff's property to produce dealers); *Schulenberg etc. Co. v. R. R.* (1895) 129 Mo. 455, 459, 31 S. W. 796; *Knapp, Stone & Co. v. St. Louis etc. R. R.* (1894) 125 Mo. 26, 35, 28 S. W. 627; *Oetting v. Pollock* (1915) 189 Mo. App. 263, 269, 175 S. W. 222.

In *Christian v. St. Louis* (1894) 127 Mo. 109, 116, 29 S. W. 996, an injunction against the city's vacating an alley was refused because the damage was trifling, if any. And see *Gay v. Mutual Union Telegraph*

III. OBSTRUCTION OF PUBLIC RIGHTS.

Remedy of private individual at law. In order that a private individual may recover at law for the disturbance or obstruction of a public right,¹²⁰ it is necessary that he should have suffered actual damage thereby;¹²¹ furthermore, in most jurisdictions the rule is laid down that the damage thus suffered must be "peculiar to him and different in kind from that to which the public is subjected."¹²² This additional requirement has, how-

Co. (1882) 12 Mo. App. 485, 493 (telegraph poles not a sufficient obstruction); *Gorman v. R. R.* (1914) 255 Mo. 483, 496, 164 S. W. 509, 512; *Kingshighway Co. v. Iron Works* (1915) 266 Mo. 138, 149, 181 S. W. 30 (property not abutting).

¹²⁰This is practically always referred to as a public nuisance. Tho the remedies of the public are the same as in cases of public nuisance proper, the difference from the standpoint of the individual is such that a separate classification and treatment was considered desirable to avoid the confusion which has crept into some of the decisions. See *post* p. 43.

¹²¹This seems to be assumed in all the cases, including those that reject the peculiar damage requirement; *Carver v. San Pedro etc. R. R. Co.* (1906) 151 Fed. 334. See 22 Harv. Law Rev. 137, 148.

¹²²*Harniss et al. v. Bulpitt* (1905) 1 Cal. App. 140, 81 Pac. 1022. *Adler v. Metropolitan Elev. Ry. Co.* (1893) 138 N. Y. 173, 33 N. E. 935. See also 11 Harv. Law Rev. 66 discussing *Morris v. Graham* (1897) 16 Wash. 343, 47 Pac. 752 (plaintiff suffered peculiar damage in his occupation as a fisherman). In *Anglo-Algerian S. S. Co. v. Houlder Line* (1908) 1 K. B. 659 the plaintiff sought to recover for delay due to negligently damaging a dock which was owned by a corporation but which was by statute open to all upon the payment of dock rates. The court refused to follow the analogy of the obstruction of a public right and denied recovery; see 21 Harv. Law Rev. 544. In *Wilkinson etc. Co. v. McIlquham* (1905) 14 Wyo. 209, 83 Pac. 304, the defendant excluded the plaintiff from using government lands over which the public had a right to use as a common for pasturage for stock; the plaintiff failed to get relief because he suffered no peculiar damage; 19 Harv. Law Rev. 549. *Bailey v. Culver* (1884) 84 Mo. 531, 538; *Cummings Realty Co. v. Deere & Co.* (1907) 208 Mo. 66, 82, 106 S. W. 496; *Schewrich v. Light Co.* (1904) 109 Mo. App. 406, 421, 84 S. W. 1003; *Heer Dry Goods Co. v. Citizens' Ry. Co.* (1890) 41 Mo. App. 63, 74; *Shelton v. Lents* (1915) 191 Mo. App. 699, 705, 178 S. W. 242; *Hisey v. City of Mexico* (1894) 61

ever, very slight, if any, justification,¹²⁸ and has been severely criticised.¹²⁹

Remedy of private individual in equity. Apparently the individual is not entitled to a remedy in equity unless he could have recovered at law.¹³⁰ Whether it is sufficient in all cases

Mo. App. 248, 253 (but an awning is not necessarily an illegal obstruction); *Ellis v. R. R.* (1908) 131 Mo. App. 395, 399, 111 S. W. 839: "The rule is that a complainant's damage must be such as is special and peculiar to him. If his damage is of like kind with that of the general public, tho greater, he cannot recover. But it must be borne in mind that the fact that others may be in the same situation with plaintiff as regards the effect upon the use of their property, yet that will not bring her within the rule preventing her recovery. There may be others in the same block as effectually cut off by the embankment as is the plaintiff; still she may recover. Others being in like situation with her and suffering the same kind of damages does not constitute the general community in the sense of the rule just stated." *Weller v. Lumber Co.* (1913) 176 Mo. 243, 251, 61 S. W. 853; *In re Heffron* (1913) 179 Mo. App. 639, 654, 162 S. W. 652 (interference with land occupier's right of access to public way called a peculiar damage, etc.)

In *Morie v. St. Louis Transit Co.* (1905) 116 Mo. App. 12, 27, 91 S. W. 962, the plaintiff failed to get relief because a switch frog "liable to catch and hold vehicles" was not a nuisance.

¹²⁸Coke, First Institute, 56a suggested that to allow anyone who was damaged to sue at law would lead to a multiplicity of actions and clog the courts. See 15 Col. Law Rev. 5-7 for an answer to this.

¹²⁹For an exhaustive criticism see 15 Col. Law Rev. 1-23; 142-165; Obstruction to Public Passage, by Professor Jeremiah Smith. See also 12 Harv. Law Rev. 358 approving *Piscataqua Navigation Co. v. New York etc. R. R. Co.* (1898) 89 Fed. 362. The right to abate seems to be enjoyed by any one having occasion to make use of the public right; *James v. Hayward* (1631) Croke, Charles, 184 (removing gate across public way); or by one who suffers substantial damage. See *Gates v. Blincoe* (1834) 2 Dana (Ky.) 158, 26 Am. Dec. 440. *Sullivan Realty Co. v. Crockett* (1911) 158 Mo. App. 573, 582, 138 S. W. 924 (either private citizen or city official may abate cess pool in street if no unnecessary damage done.)

¹³⁰*Fessler v. Town of Union* (1903) 67 N. J. Eq. 14, 56 Atl. 272. See also 7 Col. Law Rev. 364; 11 Harv. Law Rev. 66. *Corning v. Lowerre* (1822) 6 Johnson's Ch. 439. *Glaessner v. Anheuser Busch Assoc.* (1890) 100 Mo. 508, 516, 13 S. W. 707 (railroad track in street); *Ruckett v. Grand Ave. Ry.* (1901) 163 Mo. 260, 278, 63 S. W. 814; *Gorman v. C. B.*

that he could have recovered at law in order to be entitled to equitable relief does not seem clear, but it would seem that it is probably enough, especially in those jurisdictions that hold the peculiar damage rule.¹²⁸

Remedy of the public—purprestures. The remedy of the public in case of an obstruction of a public right is by indictment

& Q. R. R. (1913) 255 Mo. 483, 495, 164 S. W. 509; *Kingshighway Supply Co. v. Iron Works* (1915) 266 Mo. 138, 150, 181 S. W. 30.

¹²⁸The decisions seems to take for granted that an individual entitled to an action is entitled to equitable relief. That a plaintiff may have an injunction where damages would be inadequate is certainly true. See *Georgetown v. Alexandria Canal Co.* (1838) 12 Peters 91, 99. In the following cases the plaintiff was held entitled to equitable relief; *Shepard v. May* (1899) 83 Mo. App. 272 (highway vacated); *McKinney v. Northcutt* (1905) 114 Mo. App. 146, 161, 89 S. W. 351 (obstruction of navigable stream); *Duback v. R. R.* (1886) 89 Mo. 483, 489, 1 S. W. 86; *Cummings v. St. Louis* (1886) 90 Mo. 259, 263, 2 S. W. 130; *Baker v. McDaniel* (1903) 178 Mo. 447, 472, 77 S. W. 531 ("but this power is usually exercised at the instance of the public and not private individuals"); *Swinhart v. Ry. Co.* (1907) 207 Mo. 423, 436, 105 S. W. 1043; *Tracy v. Brittle* (1908) 213 Mo. 302, 317, 112 S. W. 45 (interference with public burying ground); *Wooldridge v. Smith* (1912) 243 Mo. 190, 204, 147 S. W. 1019 (*dictum*); *Ettenson v. R. R.* (1912) 248 Mo. 395, 421, 154 S. W. 785 (tracks in street); *Sherlock v. K. C. Belt R. R.* (1897) 142 Mo. 172, 186, 43 S. W. 629 (tracks in street); *Heer Dry Goods Co. v. Ry. Co.* (1890) 41 Mo. App. 63, 81; *State v. Saline Co. Court* (1873) 51 Mo. 350, 381. In *Givens v. McIlroy* (1894) 79 Mo. App. 671, 678, the plaintiff failed to get an injunction against the maintenance of a toll gate because he could not show peculiar damage.

In *State ex rel v. Paper Co.* (1913) 173 Mo. App. 718, 720, 160 S. W. 9 it was held that suit was properly brought by the State on relation of the owner of an adjoining building, to enjoin the maintenance of platforms in the street.

In *Versteeg v. Wabash R. R.* (1913) 250 Mo. 61, 73, 156 S. W. 689 the plaintiff was barred by *laches*.

In *Julia Bldg. Ass'n. v. Bell Telephone Co.* (1883) 13 Mo. App. 477, 486 an injunction against the maintenance of a telephone pole in the street was refused because it had been licensed by the city and was not inconsistent with the public easement.

In *Cummings Realty Co. v. Deere & Co.* (1907) 208 Mo. 66, 84, 106 S. W. 496 the court held that the peculiar damage requirement ap-

or injunction at the suit of the Attorney General—the same as in the case of a public nuisance proper.¹²⁰

Where the obstruction of a public right takes the form of a permanent structure, such an encroachment is frequently called a purpresture. If a purpresture causes damage it is treated like any other obstruction of a public right.¹²¹ Where no damage is

plied equally whether the plaintiff sought damages or an injunction. And see *Schewrich v. Light Co.* (1904) 109 Mo. App. 406, 421, 84 S. W. 1003; *Atterbury v. West* (1909) 139 Mo. App. 180, 186, 122 S. W. 1106; *Gay v. Mutual Union Telegraph Co.* (1882) 12 Mo. App. 485, 493, (*dictum*).

¹²⁰See *post* p. 40. In *Attorney General v. Sheffield Gas Consumers Co.* (1852) 3 DeGex, McN. & G. 304 an injunction against laying gas pipes in a highway was denied because the damage was slight. In *Coosaw Mining Co. v. South Carolina* (1891) 144 U. S. 550 the state succeeded in preventing the removal of phosphate rock from the bed of the Coosaw River. In *State v. Ohio Oil Co.* (1897) 150 Ind. 21, 49 N. E. 809 the state was given an injunction against the waste of natural gas on the ground that altho the defendant's property interest in the gas was unsalable, there was a public interest against the wastage of energy which was entitled to protection. This is somewhat analogous to the obstruction of a public right.

State ex rel. v. Vandalia (1900) 119 Mo. App. 406, 419, 94 S. W. 1009 (obstruction in street); *State ex rel v. Busse* (1910) 153 Mo. App. 466, 134 S. W. 680; *State ex rel v. Road Co.* (1907) 207 Mo. 54, 721, 105 S. W. 752; *State ex rel v. Gravel Road Co.* (1905) 116 Mo. App. 175, 202, 92 S. W. 153; *State ex rel v. Paper Co.* (1913) 173 Mo. App. 718, 721, 160 S. W. 9. In *State ex rel v. Feitz* (1913) 174 Mo. App. 456, 160 S. W. 585 the defendant had been indicted and fined but failed to remove the obstruction; an injunction was given at the suit of the prosecuting attorney.

Or the proper public official may abate; *Heitz v. St. Louis* (1892) 110 Mo. 618, 626, 19 S. W. 735; *Galloso v. Sikeston* (1907) 124 Mo. App. 380, 101 S. W. 715.

¹²¹*Attorney General v. Richards* (1795) 2 Anstruther 603, 1 Ames Eq. Cas. 615 (defendant had erected a wharf, docks and other buildings between high and low water mark interfering with navigation and causing the harbor to fill with mud.) In *Attorney General v. Williams* (1899) 174 Mass. 476, 55 N. E. 77, 1 Ames Eq. Cas. 619, the defendant had erected a building in Copley Square, Boston, above the limit of height prescribed by the statute which was interpreted as giving rights to the public similar to rights in highways and navigable streams. On

caused there is a conflict of authority as to whether the State may require its removal.¹²⁸

IV. PUBLIC NUISANCE.

Definition. A private nuisance¹²⁹ which affects a considerable portion¹³⁰ of the public becomes thereby a public nuisance.¹³¹ The most common illustrations are nuisances which affect the health¹³² and comfort¹³³ of the community. In recent years there

writ of error the decision was affirmed in (1899) 177 U. S. 190. In *Fessler v. Town of Union* (1903) 67 N. J. Eq. 14, 56 Atl. 272, equitable relief was given to a private individual against the erection of a fire bell in the public square because the ringing of the bell would damage the plaintiff's near-by property to a greater degree than it would the property further away.

¹²⁸In some jurisdictions the rule is that a purpresture is not removable until it causes damage; *People v. Mould* (1899) 55 N. Y. Supp. 453 (wharf in the Hudson River); *People ex rel v. Davidson* (1866) 30 Cal. 799 (wharf in San Francisco Bay); *Attorney General v. United Kingdom Electric Telegraph Co.* (1861) 30 Beav. 287 (telegraph wires in highway.) In other jurisdictions a purpresture is removable at any time. *Attorney General v. Smith* (1901) 109 Wis. 532, 85 N. W. 512 (pier in shallow waters of navigable lake.) See 1 Col. Law Rev. 408.

¹²⁹*Secante* p. 3.

¹³⁰Bell ringing may be a private nuisance to those living very close but not a public nuisance because to those farther away the ringing of the bells is pleasing instead of annoying. *Soltan v. DeHeld* (1851) 2 Sim. (N. S.) 133.

¹³¹In this subdivision will be considered public nuisances in the narrow sense, not including obstructions of a public right, which are discussed *ante* p. 36.

¹³²*Attorney General v. Hunter* (1826) 1 Devereaux (N. C.) 12, 1 Ames Eq. Cas. 621 (mill pond); *Attorney General v. Manchester* (1893) 2 Ch. Div. 87 (small pox hospital). In *Everett v. Paschall* (1910) 61 Wash. 47, 111 Pac. 879 a tuberculosis sanatorium was held to be a nuisance tho there was no actual danger of infection. For a criticism of the decision see 24 Harv. Law Rev. 407, 11 Col. Law Rev. 292.

¹³³*Duke of Grafton v. Hilliard* (1736) 1 Ambler 160, note (smoke from brick kiln); *Cronin v. Bloemcke* (1899) 58 N. J. Eq. 313, 43 Atl. 605, 1 Ames Eq. Cas. 560 (noise of disorderly crowds attracted by baseball game.)

has been legislation in some states in protection of public morals declaring certain things to be public nuisances which would be neither private nor public nuisances apart from such statute.¹²⁶ There has been a tendency to recognize the protection of the public morals as a legitimate field for equitable interference without a statute,¹²⁷ and also a slight tendency thus to recognize public aesthetics.¹²⁷

Remedy of the public. At common law the remedy of the public is by indictment.¹²⁸ The equitable remedy is sought either

¹²⁶Most of this legislation has been aimed at saloons. See *Littleton v. Frits* (1885) 65 Iowa 488, 22 N. W. 641, 1 Ames Eq. Cas. 31 holding such a statute constitutional. It has been held that such a statute does not authorize a private individual to abate; *State v. Stark* (1901) 63 Kan. 529, 66 Pac. 243; 15 Harv. Law Rev. 415.

In *State ex rel v. Uhrig* (1883) 14 Mo. App. 413 the court refused to enjoin an unlicensed saloon tho it was a public nuisance.

¹²⁷These are chiefly cases of injunctions against allowing prize fights to be held; *Attorney General v. Fitzsimmons* (Ark., 1896) 35 Amer. Law Register, 100, 1 Ames Eq. Cas. 622; *Com'th v. McGovern* (1903) 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280.

State ex rel v. Canty (1907) 207 Mo. 439, 459, 105 S. W. 1078 (bull fight) *State ex rel v. Moon* (1918) 202 S. W. 609; *State ex rel v. Lamb* (1911) 237 Mo. 437, 456; 141 S. W. 665 (disorderly house); *State ex rel v. Jones* (1918) 202 S. W. 606. See *ex parte Laymaster v. Goodin* (1914) 260 Mo. 613, 619, 68 S. W. 754 (injunction refused against bawdy house because not a public nuisance); *State ex rel v. Moffett* (1910) 194 Mo. App. 286, 291, 188 S. W. 930 (injunction refused against wholesale liquor house because not shown to be a public nuisance); *State ex rel v. Kirkwood Club* (1916) 187 S. W. 819; *State ex rel v. R. R.* (1917) 191 S. W. 1051; *State ex rel v. Woolfolk* (1916) 269 Mo. 389, 395, 190 S. W. 877.

¹²⁸See 20 Harv. Law Rev. 35-45; 8 Col. Law Rev. 226; 21 Harv. Law Rev. 445.

¹²⁹As a matter of substantive law a public nuisance is usually not a crime in the narrow sense but a public tort. But the state has found it more convenient to use the machinery of the criminal law than to bring an action on the case for damages. Where a public nuisance involves a breach of the peace—as for example, a prize fight—there is a crime in the narrow sense and hence in *Attorney General v. Fitzsimmons supra* no injunction was issued against the principals in the prize fight on the ground that the normal remedy against them was by indictment for a misdemeanor.

by the state¹³⁰ or by a municipality¹³⁰ to which such power has been delegated. If the municipality is itself guilty of maintaining a public nuisance, the state¹³⁰ is obviously the proper party to ask for relief.

Remedy of private individual. The fact that a private nuisance is also a public nuisance because it affects a large portion of the public should not in any way diminish what would otherwise be the rights and remedies of the private individual and this seems to be the prevailing view.¹³² In a few cases, however, the

¹³⁰Usually through a bill filed by the Attorney General. In Missouri such suits are brought by the prosecuting attorney; *State ex rel v. Lamb* (1911) 237 Mo. 437, 451, 141 S. W. 665; *State ex rel v. Excelsior Powder Co.* (1914) 259 Mo. 254, 271, 169 S. W. 267 (powder magazine close to village). That the public is not barred by laches or the statute of limitations see *State ex rel v. Excelsior Powder Co. supra* at page 284; but a private individual is apparently barred; see *Skinner v. Slater* (1911) 159 Mo. App. 589, 592, 141 S. W. 733; *Smith v. Sedalia* (1899) 152 Mo. 283, 300, 53 S. W. 907; *Schumaker v. Shawhan* (1902) 93 Mo. App. 573, 579, 67 S. W. 717.

¹³²See 23 Harv. Law Rev. 645; 26 Id 371; *City of Kansas v. McAleir* (1888) 31 Mo. App. 433 (city also had power under charter to declare what is nuisance.) But not if city itself created the nuisance on the defendant's land; *City of Hannibal v. Richard* (1889) 35 Mo. App. 15, 21.

¹³⁴*Com'th of Pennsylvania v. East Washington* (1911) 60 Pittsburg Leg. J. 300 (city sewage plant a public nuisance). In *Georgia v. Tennessee Copper Co.* (1907) 206 U. S. 230 the State of Georgia, suing in the U. S. Supreme Court was held entitled to an injunction against the discharge of noxious gases by a Tennessee Corporation across the state line; tho damages might have been an adequate remedy for a private person, a state was not required to part with its quasi sovereign rights for damages. See 21 Harv. Law Rev. 132, 144, 7 Col. Law Rev. 617.

See *State ex rel v. Hager* (1886) 91 Mo. 452, 455, 3 S. W. 844. If after a reasonable time the city does not abate a nuisance in a public street, the city becomes liable for consequences as if it had itself created the nuisance; *Roth v. City of St. Joseph* (1912) 164 Mo. App. 26, 30, 147 S. W. 490.

¹³²*Cronin v. Bloemcke* (1890) 58 N. J. Eq. 313, 1 Ames Eq. Cas. 560 (base ball game). See also *Bellamy v. Wells* (1890) L. J. Ch. D. 156 (disorderly boxing contest.)

confusion¹⁴³ resulting from calling the obstruction of a public right a public nuisance has caused the courts to require that in order to get relief from a public nuisance in the narrow sense the private individual must show peculiar damage not suffered by the public in general.¹⁴⁴

GEORGE L. CLARK.

¹⁴³For a clear statement of the distinction see *Wesson v. Washburn Iron Co.* (1860) 13 Allen (Mass.) 95, 90 Am. Dec. 181.

¹⁴⁴*Cranford v. Tyrrell* (1891) 128 N. Y. 341 (bawdy house). See also *Myers v. Malcolm* (1844) 6 Hill (N. Y.) 292, 41 Am. Dec. 744 (action on the case for explosion of quantity of gunpowder kept in village). Even in cases of obstruction of a public right, the requirement of peculiar damage has been criticized. See also *ante* p. 36.

Unfortunately the confusion has apparently pervaded the Missouri decisions; *Hayden v. Tucker* (1866) 37 Mo. 214, 221; *Schoen v. Kansas City* (1895) 65 Mo. App. 134, 138 (sewage); *Warren v. Cavanaugh* (1888) 33 Mo. App. 102, 109 (stone quarry); *Hodson v. Walker* (1913) 170 Mo. App. 632, 637, 157 S. W. 104 (bawdy house); *Smith v. McConathy* (1848) 11 Mo. 517, 521 (distillery and hog pens); *Bothe v. R. R.* (1914) 181 Mo. App. 720, 723, 164 S. W. 709 (noisy coal chute).

The mere fact that a city has declared to be a nuisance a frame building within the fire limits of the city does not entitle a private individual to enjoin. *Rice v. Jefferson* (1892) 50 Mo. App. 464, 471.

BAR BULLETIN

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It should be highly gratifying to every member of the Missouri Bar Association to learn that its committee on publications has consummated an arrangement by which the bulletins heretofore issued by the School of Law of Missouri University and the Missouri Bar Association have been consolidated.

This will be published quarterly, the same as the bulletin of the American Bar Association, and will be sent to all members of the Missouri Bar Association. The form and makeup of this publication is much more attractive and convenient than that of the old Bar Bulletin published by

¹Committee on Legal Publications:

this association, and will be suitable in size for filing and preserving by the members of this association.

The matter heretofore in the University Bulletin has been of a high degree of excellence, not only of interest, but very instructive, to every Missouri lawyer, and our committee on publications hopes to furnish such additional matter for each issue as will be of interest to all Missouri lawyers, so that this publication will be such that no Missouri lawyer can afford to be without it. It will keep the individual lawyer in touch with the doings of the association as well as in touch with matters of interest concerning the profession.

The University and the association are to bear the expense of this publication, each in proportion to the pages used by each. We know of no law periodical the price of which is less than five dollars per year. The members of this association pay only five dollars per year annual dues and will also receive, without additional cost, this high class publication.

This arrangement can only be carried out if each member of this association is prompt in meeting his obligation in the payment of his dues. The condition of our treasury is not very promising at this time, and there are on the books a large number of members whose dues are delinquent, some of them for two or three years, and it is hoped that each and every member who is delinquent will at once send a check to the Treasurer of the Association in payment of such delinquency so that this excellent arrangement may be continued.

The well known standing and ability of the gentlemen composing the board of assistant editors are a sufficient guaranty of the high standard we may expect in the future issues of this combined periodical. All matter intended for the bulletin should be sent to this board.

We bespeak for the bulletin the support of all Missouri lawyers.

ROBERT LAMAR.

The meeting of the Bar Association in Kansas City October 3 and 4 was considered to have been the most successful in the history of the association. While this was due in part to the splendid program that had been arranged yet it is hoped that the lawyers of Missouri are aware that law has a social aspect which heretofore has not been fully appreciated.

The Association at its October meeting adopted a resolution which appears below. It aroused a most vigorous debate. Among others, President Jones of St. Louis and Judge Evans of West Plains argued for its adoption. While sympathizing with the purpose of the resolution Mr. Charles M. Hay and Mr. John Lashly of St. Louis opposed its adoption for the reason that the power once given would prove unwieldy and

an instrument of oppression. The resolution has caused more comment outside the association than any other action of the association. It was recently the subject of a debate in the Athenaeum Debating Society of the University.

RESOLUTION AS FINALLY ADOPTED

WHEREAS, the Constitution of the United States and the Constitutions of the several states of the Union, make ample provision for changes or repeal through the exercise of lawful methods in fundamental laws of the United States and of the several States; and

WHEREAS, both Federal and State Governments have established, and so maintain, ample agencies through which changes in the law or repeal may be effected; and

WHEREAS, all classes of people have the right to avail themselves of the ballot, free speech, and other lawful agencies, to accomplish such changes or repeal; and

WHEREAS, the use of physical force and violence to accomplish such changes in the law or repeal are unnecessary and un-American;

NOW, THEREFORE, BE IT RESOLVED, by the Missouri Bar Association, in regular meeting assembled, as follows:

THAT the Missouri Bar Association hereby recommends to the Congress of the United States and to the Legislature of each of the States in the Union, the passage of laws which shall, respectively, in substance, provide as follows:

THAT any person who shall privately or publicly advocate, either verbally or in writing, or attempt to bring about by individual action or by combining with others, any changes in or nullification of our laws, constitutional or statutory, state or national, by means of physical force or violence, shall be punished by imprisonment at hard labor, or, in the case of aliens, by deportation.

The association after a lively debate adopted a resolution favoring the purpose of the new constitutional convention association to secure such a convention by means of the initiative.

The recent election in New York City has demonstrated that lawyers organized are a great force in securing the proper sort of judges for

our courts. The action of the Kansas City Bar Association under the leadership of President Neel in selecting a lawyer to be presented to Governor Gardner for a vacancy on the Supreme Court was not only successful but it points to the road for the future. It is possible for a bar association to deny the political boss his assumed power of foisting upon the electorate judges who are chosen for reasons satisfactory to the organization alone. With the proper leadership public opinion will support the higher standards advocated by this and similar associations.

The Conference of Judges, for many years held in St. Louis during the Christmas holidays, met in Kansas City the day preceding the last meeting of the association. Some thirty odd circuit and appellate judges were present. The principal subject of discussion was the recent juvenile court statute, in which Judges Ewing Cockrell, E. E. Porterfield, E. M. Dearing and others took part. Judge David H. Harris of Fulton was elected President and Judges W. O. Thomas and E. E. Porterfield of Kansas City respectively Secretary and Treasurer.

Since these conferences will hereafter be held along with the Bar Association meetings, a much better attendance and greater interest will result.

One reason why many lawyers could not attend the association meetings was because the judges would not adjourn their courts. This reason, it is to be hoped, will disappear and the judges from the Supreme Court down will become regular attendants and participants at both the conference and association meetings. It is a good thing all around for the judges once in awhile to lay aside the ermine and mingle with the lawyers, and it will not seriously hurt the lawyers.

One of the pleasant incidents of the Judicial Conference was a brief talk at luncheon by Judge Matson of the United States Circuit Court of Appeals, a resident of New York. He has the distinction of being the youngest man in the United States occupying this high position, being but 39 years of age. In speaking of the social and economic disturbances, he referred to the patriotic lawyers and others who are true to our institutions and who would save us from the perils of revolution as "the invisible khaki." This is an apt phrase as the work of the lawyers not in uniform during the war showed. There is still patriotic work to do. But the good sense and loyalty of our people will prevail. The Judge further advised that we "take each other by the hand and not by the throat."

The sudden death of Judge Henry W. Bond of the Supreme Court and the appointment of Judge Charles B. Faris, Judge of the United States District Court at St. Louis unexpectedly produced two vacancies

on the Supreme Bench which Governor Gardner has filled by appointing Judge Richard L. Goode of St. Louis and John I. Williamson of Kansas City. Judge Goode is well and favorably known to the lawyers of the state through his able decisions while a member of the St. Louis Court of Appeals. Judge Williamson has never before held any judicial office. He was born in Carroll County, Missouri. For a few years after his admission to the bar he practiced in Kentucky. Then he returned to Missouri and located in Kansas City about fifteen years ago. He is the first member of the Supreme Court from Kansas City excepting Judge Charles E. Small, Commissioner, since the incumbency of Judge Francis M. Black. Judge Williamson is a man in the prime of life, and after a varied and active practice comes to the bench well equipped for the duties of a Supreme Judge. Governor Gardner is to be thanked for his selection of these competent gentlemen.

The Missouri Bar Association is no longer a mere social organization altho this feature of itself would justify its existence. It has become and must be more and more a living force. Lawyers usually attend to everybody's business better than their own. The time must soon come when the endorsement of a bill by the association will assure its enactment into law. The standards of the profession must be kept high and the influence of the lawyer must be more effective. The Bulletin should and will become the means by which the members may be kept informed and interest between meetings sustained. Association work must be made so attractive and necessary that every reputable and self-respecting lawyer in Missouri will become a member of at least three organizations: The American Bar Association, The Missouri Bar Association, and his own local association. He owes this much to his profession and his country.

Speaking of local bar associations recalls the activity of our recent but not "late" President Jones. With his energy and wisdom he succeeded, among the many other splendid things he did, in organizing many local associations throughout the state. How many of these youngsters are being properly nourished and are alive? How many have held meetings since their organization? With approaching winter, notwithstanding the high cost of living, a local dinner with a few guests and some of our many orators would make things lively. We all know men, good talkers too, who would cross the state to make a speech and get a "possum" dinner. Seriously, it is worth consideration.

The Kansas City Bar Association at its last meeting was the host of a quartette of distinguished lawyers in attendance upon the Federal Court: Judge Charles E. Hughes, Ex-Secretary W. G. McAdoo, Ex-Attor-

ney General Wickersham, all of New York and Honorable John M. Bullett, Ex-Solicitor General of Louisville, Kentucky, with Frank Hagerman and J. D. Bowersock of the Kansas City Bar, who appeared before Judge Van Valkenburg in a proceeding involving the constitutionality of the federal act governing farm mortgages, particularly the clause exempting these securities from taxation. The arguments consumed the better part of two days resulting in the court sustaining the constitutionality of the act. An informal dinner was given these distinguished gentlemen. There the Kansas City lawyers had an opportunity to "size them up" presidentially and otherwise. An election of officers of the association was also held and Mr. Charles W. German was elected President.

The annual dues of \$5.00 for the current year are now payable. Members who have not paid may remit to Dell D. Dutton, Treasurer, Commerce Building, Kansas City, Missouri, who will cheerfully receipt therefor.

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LAW SERIES

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NOVEMBER, NINETEEN HUNDRED AND NINETEEN

NOTES ON RECENT MISSOURI CASES

BILLS AND NOTES—PAROL EVIDENCE TO CHARGE ENDORSEE AS CO-MAKER—"ACCOMMODATED PARTY"—*Overland Auto Co. v. Winters et al.*¹ After being decided in 1915 in the Kansas City Court of Appeals² this case has again appeared in the reports. The majority opinion was at that time dissented from by Judge Ellison, who caused the case to be certified to the Supreme Court for final determination. The Supreme Court has approved the decision³ of the Kansas City Court of Appeals. The facts were as follows: A and B, associates in business, contracted to purchase an automobile, to be used in their business, from C, the agent of the plaintiff company. In payment C took a note payable to himself, signed by A as maker and indorsed on the back by B, prior to delivery. The note read: "We promise to pay." Plaintiff charged B as co-maker in his petition, but set out the note showing B's signature on the back. Evidence was admitted without objection that the note was for the joint

¹(1919) 210 S. W. 1.

²(1915) 180 S. W. 56.

³The case was fully reviewed at the time of the first decision in 12 Law Se-

ries Univ. Mo. Bulletin, p. 44, and was also commented on in 29 Harvard Law Review, 549, and 25 Yale Law Journal 411.

benefit of A and B. B contended that under sections 10033 and 10034⁸ R. S. 1909 he could be charged only as an indorser and that since plaintiff did not aver presentment and notice to charge him as an indorser he was not liable. The Kansas City Court of Appeals took this view of the case. Judge Ellison in the dissenting opinion thought that the words "We promise to pay" created an ambiguity which might be explained by extrinsic evidence.⁹ The case seems to present three questions: first, can parol evidence be introduced to charge an apparent indorser as a co-maker? Second, do the words "We promise to pay" create an ambiguity which can be explained by extrinsic evidence? Third, admitting that the party B cannot be shown by parol evidence to be a co-maker, was he not an "accommodated party" within sections 10050,¹⁰ 10059,¹¹ 10085,¹² R. S. Mo. 1909 and thus not entitled to notice?

The first two questions have been fully considered in the articles mentioned in note 3. It might be added that several courts have held that only a *prima facie* liability as indorser is created by the fact of the name appearing on the back of the note, and that, as between the parties at least, parol evidence may be introduced to show the real state of affairs.¹³ The use of the words "we promise to pay" has been held to raise an ambiguity explainable by parol evidence in New York¹⁴ and California. "Considering the purpose of the Negotiable Instruments Law the

⁸These sections correspond to sections 63, and 64, of the Uniform Negotiable Instruments Act adopted by Missouri in 1905.

⁹See article in 25 Yale Law Journal 411 referred in note 3, in which the reviewer agrees with the dissenting opinion of Judge Ellison and argues that the use of the words "we promise" creates an ambiguity, explainable by parol evidence. Section 10033 R. S. 1909 provides as follows: "A person placing his signature upon an instrument otherwise than as a maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Section 10034 R. S. 1909 reads: "Where a person, not otherwise a party to an instrument, placed thereon his signature in blank before delivery, he is liable as an indorser x x x."

¹⁰"Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument

will be paid if presented." Section 80 N. I. L.

¹¹"Except as herein otherwise provided, when a negotiable instrument has been dishonored by x x x nonpayment, notice of dishonor must be given to the drawer and to such indorser, and any drawer or indorser to whom such notice is not given is discharged." Section 89 N. I. L.

¹²"Notice of dishonor is not required to be given to an indorser in either of the following cases: (1) "x x x (2) Where the indorser is the person to whom the instrument is presented for payment; (3) where the instrument was made or accepted for his accommodation." Section 115 N. I. L.

¹³*Kohn v. Consolidated etc. Co.* (1900) 63 N. Y. Supp. 265; *Mercantile Bank v. Busby* (1908) 120 Tenn. 652, 113 S. W. 390 (between the parties); *Haddock, Blanchard & Co. v. Haddock* (1908) 192 N. Y. 499, 85 N. E. 682.

¹⁴*Dunbar Box & Lumber Co. v. Martin* (1907) 103 N. Y. Supp. 91.

¹⁵*New England Electric Co. v. Shook* (1915) 145 Pac. (Calif.) 1002.

contrary holding would seem more correct, however, and the weight of authority is to that effect.¹² On the third point the reasoning of the court in the principal case is not so clear. Sec. 10050 R. S. 1909 says, "Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented." Section 10085 reads: "Notice of dishonor is not required to be given to an indorser x x x where the instrument was made or accepted for his accommodation." In the opinion in the principal case the court says: "The majority opinion and the dissenting opinion in Kansas City Court of Appeals agree that one who signs as an indorser may not by parol evidence be shown to have signed in any other capacity, but under sections 10050 and 10085 parol evidence may be introduced to show in what character he indorses, whether he is an accommodation party or the party accommodated."¹³ The court then argues that an "accommodated party" means one who gets the loan of credit without consideration.¹⁴

As noticed in the previous review of the case¹⁵ there has been considerable controversy as to the proper interpretation of the term "accommodation party." It is defined by sec. 10000 R. S. 1909¹⁶ and the cases under note 14 as one who signs "without receiving consideration therefor." "Accommodated party" is not defined, but if the definition of "accommodation party" be correct, then "accommodated party" would obviously be one for whom an instrument is signed without consideration.

On the facts proven may it not be fairly said that B was such an accommodated party? The parties contracted for the article purchased for their joint use. The seller was present and acquainted with the agreement. Under the ruling of the court and the weight of authority

¹²*Rockfield v. First Nat'l. Bank* (1907) 77 Oh. St. 311, 83 N. E. 392, 14 L. R. A. (N. S.) 842; *Gibbs v. Guaraglia* (1907) 75 N. J. Law 168; 67 Atl. 81; *McDonald v. Luckenbach* (1909) 170 Fed. 434; *Mechanics, etc. Bank v. Ketterjohn* (1910) 137 Ky. 427, 125 S. W. 1071. See collection of cases in Brannan, Negotiable Instruments Law, p. 77.

¹³Page 3 in opinion in the principal case.

¹⁴*Black's Law Dict.* defines "accommodation" as "an arrangement or engagement made as a favor to another, not upon consideration received." In the opinion in the case of *Rea v. McDonald*, 68 Minn. 187, 1. c. 191, the court gives this definition: "Accommodation paper is defined as such as is made, accepted, or indorsed by one party for the benefit

of another without consideration. It represents and is a loan of credit to the party accommodated." See also to the same effect: *Thom v. Kibbee* (1899) 62 N. J. Law, 753, 1. c. 754, 42 Atl. 729; *Dillingham v. Scott*, 19 Hawaii, 421, 1. c. 426; *Mosser v. Criswell* (1892) 150 Pa. 409, 24 Atl. 618; *Morris County Brick Co. v. Austin* (1910) 79 N. J. Law, 273, 75 Atl. 550.

¹⁵12 Law Series, University of Missouri Bulletin, page 46.

¹⁶"An accommodation party is one who has signed the instrument as a maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person x x x." This section corresponds to section 29 N. I. L.

no parol evidence could be shown to the effect that B intended to sign in any capacity other than as an endorser. A was the maker of the note both for his own benefit and for the benefit of B. For this benefit flowing to B what consideration was there coming to A? It was argued that B signed for his own benefit," which was doubtless true, but it is difficult to see why he also was not "accommodated" by the maker of the note, A.

Authorities on the point are meagre. But a well considered case in Maryland,¹⁷ where the Negotiable Instrument Law is also in effect, would seem to support this view. In that case the defendants signed as indorsers in order to secure a loan for the benefit of both the maker and themselves. The evidence showed that the payee was present and knew the agreement between the maker and indorsers and that he relied upon both for the payment of his note. The court there held that altho the loan for which the notes were given was not for the *sole benefit* of the indorsers, they were still "accommodated indorsers," within the meaning of Code Pub. Gen. Laws 1904 Act. 13, Section 99, 134, which corresponds to sections 10050 and 10085 R. S. Mo. 1909.¹⁸ In other words, the indorser was an "accommodated indorser" even tho the maker was also signing the note for his own benefit.

There is nothing violent in this construction and it would seem to give effect to the intention of the parties without defeating in any sense the intention of the Uniform Negotiable Instruments Act. Under the present ruling of the court B, who got valuable consideration from the plaintiff company, escapes liability entirely because there was no allegation of presentment and notice. If he is the accommodated party on the instrument, then, under sections 10050 and 10085 R. S. 1909, he is not entitled to notice. Should he be permitted to entirely escape merely because the note was not given for his *sole benefit*?

JESSE E. MARSHALL.

HUSBAND AND WIFE—RIGHT OF ONE SPOUSE TO RECOVER FOR LOSS OF CONSORTIUM OF THE OTHER DUE TO THE NEGLIGENT ACTS OF DEFENDANT.¹ *Bernhardt et al v. Perry.*² The plaintiff's husband, a janitor in defendant's employ, was severely injured in the course of his duties as a result of the negligence of defendant in furnishing him dangerous appliances with which to work. The plaintiff brought this action for the loss of the protection, support, and society of her husband resulting from

¹⁷See note in 12 Law Series, Univ. of Mo. Bulletin, p. 46, and opinion in the principal case.

¹⁸*Bergen v. Trimble* (1917) 101 Atl. (Md.) 137.

¹⁹See notes 6 and 8 *supra*.

¹For a discussion of this subject see 2 Law Series, Missouri Bulletin, p. 34; 24 H. L. R. 501; 26 H. L. R. 74; 10 Col. L. R. 678; 14 Mich. L. R. 689; 20 Yale L. J. 645; 77 Cent. L. J. 206.

²(1918) 208 S. W. 462 (Mo.).

those injuries. The court held that the wife was not entitled to recover on the ground that the physical injury being to the husband, he alone could recover for all damages arising out of it, including damages for his consequent inability to perform his duties to his wife.³

At common law an injury to the wife gave rise to two causes of action; one to the wife joined with her husband for the injury; the other to the husband alone for the loss of the services, comfort and society or consortium of his wife.⁴ But the wife had no corresponding right of action for an injury to her husband, either because of her inferiority to her husband, or because of her inability to sue in her own name.⁵

Under the Married Women's Acts the wife is given the right to sue alone for violations of her personal rights.⁶ She has been allowed to recover for the loss of her husband's consortium, when such loss was caused by the alienation of the husband's affections⁷ or the selling of morphine to the husband over the wife's protest.⁸ Recovery is allowed the wife in such cases because the husband by his conduct is barred. It has been said that the acts of defendant strike at the very foundation of the marriage relation itself. It also has been said that recovery is allowed because the torts of defendant are willful and intentional. Thus, a wife in *Clark v. Hill*⁹ was permitted to recover for loss of consortium against a defendant who had driven her husband insane by threats of violence. But it is not believed that such a classification of "intentional torts" is sound. The wife's right of action for loss of consortium resulting from the husband's physical inability should not be made to depend upon whether the injury to the husband was caused by negligent or intentional acts of the defendant.

When the loss of consortium and services results from the negligence of the defendant, the husband usually is given the same right of

³Woodson, J., 208 S. W. 462, 466: "with those damages collected, he would be just as able to perform all of his marital duties and obligations to her as if he had never been injured, and the law presumes he would discharge those duties to the best of his ability, which would fully compensate her for all damages she had received. But if he should not do so, then she would have her legal remedy against her husband, and not against the person who injured him."

⁴*Smith v. St. Joseph* (1874) 55 Mo. 456, 17 Am. Rep. 660; *Thompson v. Metropolitan St. R. Co.* (1896) 135 Mo. 217, 36 S. W. 625; Schouler, Husband and Wife, sections 140, 143.

⁵Schouler, Husband and Wife, section

143; 21 Cyc. 1530.

⁶Sec. 8309, R. S. 1909. The statute provides that a married woman shall have as her separate property a right in action for "any violation of her personal rights"; and that she may institute in her own name without joining her husband an action for the recovery of personal property including rights of action.

⁷*Clow v. Chapman* (1894) 125 Mo. 101, 28 S. W. 328; *Nichols v. Nichols* (1898) 147 Mo. 387, 48 S. W. 947; *Westlake v. Westlake* (1878) 34 Oh. St. 621.

⁸*Flandermeyer v. Cooper* (1912) 85 Oh. St. 327.

⁹*Clark v. Hill* (1897) 69 Mo. App. 541.

recovery since the Married Women's Acts as under the common law.¹⁰ It has been contended that, since the statute removes the disability of married women to sue the wife should have an equal and corresponding right to sue for loss of consortium and support in case the husband is injured by the defendant's negligence.¹¹ But the courts have refused to adopt this proposition, as is illustrated in the principal case.

A few courts, however, have concluded that since the wife may recover for her own injuries, and for all damage resulting therefrom, the husband should no longer have a right of action for the loss of his wife's consortium.¹² The basis of these decisions is that the wife may recover in full for the impairment of her ability to render services, and that she should share these damages with her husband.¹³ These jurisdictions recognize the right of one spouse to sue for the loss of support or services or consortium of the other only in those cases where the other spouse is denied a right of action by reason of his conduct as in alienation of affections or criminal conversation.

The law in Missouri has been formulated in accordance with the weight of authority by a line of decisions culminating in the principal case, *Bernhardt et al v. Perry*, decided by the Supreme Court en banc. The husband may recover for loss of services and consortium of his wife in cases where the loss is due to the defendant's negligence.¹⁴ The wife was refused recovery where the loss was due to a physical injury to her husband caused by the negligence of the defendant in *Stout v. K. C. Terminal R. R.*¹⁵ and in *Gambino v. Manufacturer's Coal and Coke Co.*¹⁶ The rule of these two decisions was recognized by the Supreme Court in *Bernhardt et al v. Perry*. In the three cases the distinction was drawn between negligent and intentional torts causing the loss of consortium. If in these cases there is no sound distinction between negligent torts and intentional torts then it follows that the decision in *Clark v. Hill supra* is wrong.

It would seem that the Married Women's Acts place the wife upon an equal footing with the husband; and if the husband has a right of action for loss of services and consortium of his wife, then the wife should have a similar right of action. It is further submitted that if the reason-

¹⁰*Smith v. St. Joseph* (1874) 55 Mo. 456, 17 Am. Rep. 660; *Contra: Feneff v. New York C. R. R. Co.* (1909) 203 Mass. 278, 89 N. E. 436; 24 L.R.A. N.S. 1024; *Marri v. Stamford Street Ry. Co.* (1911) 84 Conn. 9, 78 Atl. 582.

¹¹See dissenting opinion of Bond C. J. in *Bernhardt v. Perry, supra*.

¹²*Marri v. Stamford Street Ry. Co.* (1911) 84 Conn. 9, 78 Atl. 582; *Bolger v. Boston Elevated Ry. Co.* (1910) 205

Mass. 420, 91 N. E. 389; *Blair v. Seitzer Dry Goods Co.* (1915) 184 Mich. 304, 151 N. W. 724.

¹³*Marri v. Stamford Street R. Co., supra*.

¹⁴*Smith v. St. Joseph* (1874) 55 Mo. 456.

¹⁵(1913) 172 Mo. App. 113, 157 S. W. 1019.

¹⁶(1913) 175 Mo. App. 653, 158 S. W. 77.

ing of the court is sound that it would be giving double damages to allow the wife to recover for the loss of support and consortium of the husband where the loss is due to defendant's negligence, because he "is entitled to a recovery of damages resulting therefrom which in legal contemplation is supposed not only to make him whole, but enables him to support his wife and children and to discharge all of his marital and parental duties due them in the same degree that the law imposed those duties upon him previous to the injury,"¹ that the same reasoning should apply to deny the husband a recovery for loss of services and consortium of the wife.

R. E. H.

HUMANITARIAN DOCTRINE—DUTY TO TRESPASSERS—*Dalton v. M. K. & T. Ry. Co.*¹ George Dalton, twelve years old, was injured by defendant's employees while they were engaged in backing a string of cars into another string of cars on which he was playing. The accident occurred in defendant's switch yards in Hannibal. Dalton was a trespasser on the premises at the time of his injury. The evidence, however, showed that defendant had actual knowledge that children had been accustomed for several years to play in and around the cars in this switch yard. The jury were instructed in substance, that the defendant was liable if it saw or by the exercise of due care could have seen George Dalton in time to have warned him or otherwise have averted the injury, and did not do so. The jury were also instructed in effect that if user of the premises by children in their playing had been shown and that the defendant had knowledge thereof then it was the duty of the defendant to give notice before it began its switching operations. The Supreme Court held that the case involved the humanitarian rule, but that the latter instruction went beyond that rule, and imposed a duty on the defendant to warn the trespasser on the premises whether or not the latter could have been seen by the exercise of due care.

A survey of the cases reveals two possible situations where the humanitarian doctrine may arise, viz: (a) where the plaintiff's peril is discovered in time to avoid injury and (b) where it is not discovered.²

Nearly all courts permit recovery where the defendant saw the peril of the plaintiff in time to have avoided the injury by the exercise of

¹Woodson, J., in *Bernhardt et al v. Perry*, 208 S. W. 462, 465.

²(1919) 208 S. W. 828.

³Defendant saw plaintiff's peril—*Cole v. Metropolitan Street Railway Co.* (1906) 121 Mo. App. 605, 97 S. W. 555. *Dutcher v. Railroad* (1912) 241 Mo. 137, 145 S. W. 63. Plaintiff's peril could have

been discovered in time to have avoided. *Dale v. Hill-O'meara Construction Co.* (1904) 108 Mo. App. 88, 90 S. W. 1092. *Eppstein v. Pentwood* (1906) 197 Mo. 720, 94 S. W. 967. *Rapp v. St. Louis Transit Co.* (1905) 190 Mo. 155, 88 S. W. 865.

ordinary care, but there is conflict of authority where there is no actual knowledge of plaintiff's peril and the courts of this jurisdiction seem to be with the minority³ in holding that the defendant is liable for failure to discover the plaintiff's peril.

The principle case seems properly to come within the humanitarian rule. The plaintiff was a trespasser and he was negligent in being on top of a car in the defendant's switch yard where locomotives were being used to switch cars about, and where it was probable that he might be hurt.

The important question in the case is as to the extent of the duty which defendant owed to the plaintiff. Under the universally accepted rule the defendant is liable, if, after discovering the plaintiff's peril, he negligently injures him. Furthermore, knowledge of the use of the premises by trespassers is equivalent to actual knowledge of their presence on the premises; and under such circumstances there is an additional duty required of the defendant based upon the importance of human life to use due care to look out for trespassers so that their peril may be discovered and injury averted.

The Supreme Court interpreted the second instruction as above stated, to mean that the defendant must *warn* at his peril whether or not the plaintiff could have been *seen* by the exercise of due care. Does the instruction condemned extend the humanitarian doctrine? It seems quite obvious that it does. The duty of the defendant in this case was⁴ to use due care to avoid injuring plaintiff after he was discovered or could have been discovered by the exercise of due care.⁵ There was no duty to sound a warning for persons who could not have been seen.

In *Ayres v. Railroad*⁶ plaintiff in a drunken condition fell asleep on defendant's right of way at a point which had been for years used by pedestrian trespassers. Defendant had knowledge of the use. The evidence disclosed that altho the defendant's employes were looking ahead, and exercising due care, still they were not able to see the plaintiff in time to avoid running against him. The plaintiff contended that defendant was negligent in failing to give a warning when it approached the place where the presence of trespassers was to be expected, and where the plaintiff actually lay, but the court held it was not negligence to fail to sound the whistle or bell at such a place. The court held that the

³Otis, Humanitarian Doctrine, 46 Amer. L. R. 381. See note in 55 L. R. A. N.S. 421. *Betchenwald v. Metropolitan Street Ry. Co.* (1906) 121 Mo. App. 545, 97 S. W. 557.

⁴*Fearons v. Kansas City El. R. R. Co.* (1904) 180 Mo. 209, 79 S. W. 394; *Guenther v. St. Louis M. & S. Ry. Co.* (1891) 108 Mo. 18, 18 S. W. 846;

Chamberlain v. Railroad (1895) 133 Mo. 587, 33 S. W. 437; 34 S. W. 842.

⁵*Warmington v. A. T. and S. F. Ry. Co.* (1891) 46 Mo. App. 159. *Hila v. Railroad* (1890) 101 Mo. 36, 13 S. W. 946.

⁶*Ayres v. Railroad* (1905) 190 Mo. 228, 88 S. W. 608.

humanitarian rule did not apply. Apparently this case has not been overruled, and the fact that the injury in the Ayres case occurred on the main track, and not in a switch yard should not make the rule different. It is believed that this case also is an authority for the proposition that there is no duty to warn a trespasser where he could not have been seen by the exercise of due care. In *Cleveland C. C. & St. Louis Ry. Co. v. Means*, a somewhat different rule is announced.¹ There defendant was engaged in switching cars on a side track. It had constructive knowledge of the probable presence of children playing around these premises. The court left it to the jury to say whether under the circumstances, a failure to give a warning or signal before moving the cars was negligence which was the proximate cause of the injury. According to the facts in this case, it appears the defendant, had it been diligent, could have discovered the danger to which the deceased was exposed in time to have avoided injury, yet there is *dicta* in the case which would require the defendant to warn by signal. Such an extension of the doctrine seems unjustly to burden industry without promoting the security of human life. There is no sound reason for extending a doctrine that finds so little support in sound legal principles. It is submitted that both on reason and authority the court properly decided the case.

C. E. C.

PRACTICE—SUFFICIENCY OF MOTION FOR NEW TRIAL. *State ex rel United Railways of St. Louis v. Reynolds*.¹—The St. Louis Court of Appeals held that a motion for a new trial specifying that the "court erred in refusing to give and read to the jury legal and proper instructions" and "because the court erred in giving and reading to the jury erroneous, illegal, and misleading instructions" was "too general and indefinite to preserve for review such rulings."² On certiorari, the Supreme Court *en banc* held the motion was sufficient to present for review the instructions given and refused.

The question as to how definite specification of error in a motion for a new trial must be to preserve for review the correctness of instructions complained of has been the subject of some conflict of opinion in recent decisions. An analysis of the cases on this point discloses two important questions for consideration, viz: (a) does section 1841, R. S. 1909³ apply to motions for a new trial, and, if so, what degree of definite-

¹(1914) 104 N. E. 785, 55 Ind. App. 243.

²(1919) 213 S. W. 782. Faris, Williams, and Walker, JJ., dissenting.

³*Lampe v. United Railway Co. of St. Louis* (1918) 202 S. W. 438.

⁴This section is printed under Article

V of the Practice Code entitled "Pleadings" and reads, "All motions shall be accompanied by a written specification of the reasons upon which they are founded; and no reason not so specified shall be urged in support of the motion."

ness is required; and, (b) if this statute does not apply what rule obtains?

(a) Section 1841 first came into our practice act in 1835⁵ under Article VII entitled "New Trials," but the section also contained a provision as to the time of filing motions for new trials.⁶ The section was divided in R. S. 1845⁶ and the provision as to the time of filing a motion for a new trial was separated from that part which provided what the motion should contain, each being placed in a distinct section. Both sections were printed under the article, "New Trials," and had reference only to motions for a new trial and in arrest of judgment. In R. S. 1855, the section which provided what a motion should contain (now Section 1841) was changed to read "all motions," etc., and was printed under the "Miscellaneous Provisions" of Article VI of the Practice Act entitled "Pleadings."⁷ As Faris, J., pointed out in *State v. Rowe*,⁸ it was "then for the first time made to apply to all formal motions of whatever kind made under the civil code." Did the shifting of this section from the article, "New Trials," to another article of the Practice Code called "Pleadings" and the changing of its phraseology to "all motions," prohibit its further application to motions for a new trial?

This question has been answered in the negative by a majority of the cases.⁹ The writer of the majority opinion in *Wampler v. Atchison, T. and S. Ry. Co.*¹⁰ however took the view that this section did not apply to motions for a new trial, because it was placed under the article "Pleadings" and must be construed in the light of its surroundings and refers to motions of all kinds which are in the nature of pleadings or which attack pleadings. But the majority of the court did not place the

⁵Sec. 1, p. 469, R. S. 1835.

⁶This is now covered by Sec. 2025. R. S. 1909.

⁷Art. VII, Sec. 1. "All motions for new trials and in arrest of judgment shall be made within four days after the trial, if the term shall continue so long, and if not, then before the end of the term. Sec. 2. Every such motion shall be accompanied by a written specification of the reasons upon which it is founded."

⁸Sec. 27, p. 1235. Identical in form with Sec. 1841, R. S. 1909. See note 3 *supra*. This section has retained its present form and position in the statute since 1855. Sec. 48, p. 662, G. S. 1865; Sec. 3557, R. S. 1879; sec. 2085, R. S. 1889; Sec. 640, R. S. 1899; Sec. 1841, R. S. 1909.

⁹(1917) 271 Mo. 88, 95; 196 S. W. 7.

¹⁰*Carver v. Thornhill* (1873) 53 Mo. 283; *Sweet v. Maupin* (1877) 65 Mo. 65; *Fox v. Young* (1884) 22 Mo. App. 386; *Alexander v. The Grand Avenue Ry. Co.* (1893) 54 Mo. App. 66; *Dale v. Parker* (1910) 143 Mo. App. 492; 128 S. W. 510; *Bouillon v. Laclede Gas Light Co.* (1912) 165 Mo. App. 320, 147 S. W. 1107; *State v. Gifford* (1916) 186 S. W. 1058; *Johnson v. Waverly Brick and Coal Co.* (1918) 205 S. W. 615; *Wynne v. Waggoner Undertaking Co.* (1918) 204 S. W. 15; *Bright v. Sommers* (1919) 214 S. W. 425. *Contra*: *Chapman v. Rueberg* (1902) 95 Mo. App. 127, 68 S. W. 974; *Hooper v. Standard Life and Accident Insurance Co.* (1912) 166 Mo. App. 209, 148 S. W. 116.

¹¹(1916) 269 Mo. loc. cit. 473, 190 S. W. 908.

decision on this ground, and the view expressed is *obiter*.¹¹ The majority opinion in the principal case does not discuss section 1841 but merely cites the Wampler case. It is, therefore, not authority for the proposition that section 1841 does not govern motions for a new trial. It is submitted that this section, in the light of its history and by the weight of authority, is applicable to such motions.¹²

A majority of the cases which apply section 1841 hold that a general assignment of error in instructions is not sufficient in a motion for a new trial.¹³ The Wampler case distinguishes a few cases¹⁴ on the ground that they do not condemn a general assignment of error as to instructions, but it is said by Graves, J., that they merely hold that there were no assignments of error in the motions in those cases covering the particular errors urged on appeal. But neither are these cases authority for the proposition that a general assignment of error is good even if it were broad enough to cover the error complained of.

(b) Even those cases which do not consider section 1841 applicable incline towards the view that a motion for a new trial must be specific in its assignment of error.¹⁵ The Wampler case is cited in the principal

¹¹In the principal case, 213 S. W. loc. cit. 784, Walker, J., (dissenting) discussed the Wampler case and said, "This for the reason that the motion in that case was sufficiently specific to conform to the requirements of section 1841 and hence the general observations of the learned writer of that opinion may not unfairly be classed as *obiter* so far they conclude that said section is not controlling."

¹²Bond, J., (concurring in result only) said in the Wampler case, 269 Mo. loc. cit. 486, "I do not think a statute so all embracing in its language can be logically limited only to certain motions filed during the trial of a law suit which are addressed to the 'Pleadings.'"

¹³Thus the following assignments of error have been held insufficient: that "the court erred in giving improper instructions to the jury," *Bright v. Sammons* (1919) 214 S. W. 425; *Wolf v. Bawn* (1919) 211 S. W. 697; *contra*, *Hooper v. Standard Life and Accident Ins. Co.* (1912) 116 Mo. App. 209, 148 S. W. 116; that the court gave "illegal, improper, and erroneous instructions over defendants motion," *State v. Rowe* (1917) 271 Mo. 88, 196 S. W. 7; *State v. Selleck* (1917) 199 S. W. 129; that

"the court misdirected the jury as to the law in the case," *Wynne v. Waggoner Undertaking Co.* (1918) 204 S. W. 15; *Sweet v. Maupin* (1877) 65 Mo. 65; *State ex rel v. Woods* (1911) 234 Mo. 16; *Maplegreen Co. v. Trust Co.* (1911) 237 Mo. 350; *Polski v. City of St. Louis* (1915) 264 Mo. 458.

¹⁴Graves, J., said, 269 Mo. 481, that the cases did not hold that a general assignment of error in the motion was insufficient but only "that the motion failed to contain any assignment of error (either general or specific) which would cover the assignment urged in the appellate courts."

¹⁵*Matthews v. Central Coal & Coke Co.* (1915) 177 S. W. 650; *Kansas City Disinfecting Co. v. Bates* (1918) 273 Mo. 300, 201 S. W. 92; *Seitz v. Pelligreen Const. and Inv. Co.* (1918) 203 S. W. 503; *Nitchman v. United Ry. Co. of St. Louis* (1918) 203 S. W. 491; *Probst v. St. Louis Basket and Box Co.* (1919) 207 S. W. 891; *Kansas City Trunk Co. v. Bush* (1919) 208 S. W. 625; *Grace et al v. M. K. & T. Ry. Co.* (1919) 212 S. W. 41; *Baker v. Bakewell* (1919) 208 S. W. 844; *Contra*, *Palmer v. Huckstead* (1917) 197 Mo. App. 512, 196 S. W. 1053.

case as authority for the rule that a general allegation of error in a motion is good, yet the motion in the Wampler case stated that "each and all of the instructions" were erroneous and the expressions of the court on general assignments may be construed as *dicta*.³⁰

One of the functions of a motion for a new trial is to direct the mind of the trial court to the specific error committed on the trial.³¹ It would seem that a motion to fulfill this office and to reduce the labor of courts and afford trial courts a fair opportunity to correct error, should at least point out what particular instruction or instructions are wrong.³² Altho the decision of the principal case does not exclude the further application of section 1841 to motions for a new trial, it definitely establishes the rule of practice in Missouri that the correctness or incorrectness of *instructions* given or refused by a trial court in a civil case may be preserved for review on appeal by a motion couched in the most general language.

J. C. B.

ACCIDENT INSURANCE—"SUICIDE STATUTE"—INSANITY—*Scales v. National Life & Accident Ins. Co.* Section 6945 R. S. Mo. 1909, commonly known as the "suicide statute," provides as follows: "In all suits on policies of insurance on life hereafter issued by any company doing business in this state to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide

³⁰In *Wynne v. Waggoner Undertaking Co.* (1918) 204 S. W. 15, Walker, J., discussed the Wampler case and said, "This case seems from its reasoning to hold that a general statement in a motion for a new trial as to errors in instructions is sufficient, but it will be found that the motion in that case while general in its terms, so far as ignoring the number of the instructions is concerned is specific in referring to each and all of those to which objections are interposed, and therefore it was not general in the sense in which such motions have been ruled insufficient in other cases, which is not the fact in the instant case."

³¹*Rohrer v. Brockhage* (1884) 15 Mo. App. 16, 25; *Bouillon v. Laclede Gas Lights Co.* (1912) 165 Mo. App. loc. cit. 324; 147 S. W. 1107; In *Maplegreen Co. v. Trust Co.* (1911) 237 Mo. loc. cit. 363, 141 S. W. 621, 624, Lamm, C. J.,

speaking for the Supreme Court *en banc* said, "..... the office of a motion for a new trial is to gather together those rulings complained of as erroneous and solemnly and formally present them, one by one, in black and white, to the judge, in order that he may have a last chance to correct his own errors without the delay, expense or other hardships of an appeal. This, on the theory that even a judge is entitled to a last chance—a *locus poenitentiae*."

³²Walker, J., (dissenting) in the principal case, 213 S. W. 782, 783, said, "The cardinal purpose of our code of procedure is one of simplicity and directness. . . . An observance of the requirements of this section (1841) cannot but aid the trial court in readily ascertaining and speedily determining the errors assigned, especially as to instructions."

at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

The recent cases of *Scales v. National Life & Accident Ins. Co.*¹ *Brunswick v. Standard Accident Ins. Co.*,² and *Wacher v. National Life & Accident Ins. Co.*³ presented the question whether by virtue of the above statute, the beneficiary under an accident policy would recover where the insured had committed suicide while sane.

This question the Supreme Court answered in the negative. The reasons were: To recover under an accident policy the insured must have met death by means of an accident;⁴ self-destruction while sane is not an accident;⁵ hence, while the statute prevents the defense of suicide it will not be inflated to prevent a showing that the insured did not meet an accidental death, and so create a cause of action where none exists.⁶

Authority on the precise point from other jurisdictions was lacking because statutes of this nature are found in very few states. In Missouri the question had never been fully considered. The courts seem tacitly to have regarded suicide while sane as an accident.⁷

The Supreme Court in the *Scales* and *Brunswick* decisions goes at some length into prior decisions in Missouri. A passing reference will do here. Judge Faris at p. 48 of 213 S. W. in the *Brunswick* case says of *Logan v. Ins. Co.*:⁸ "Under these defenses and the above admission it was competent for the court to find and conclude that the insured was insane when he committed suicide." Such a conclusion disposes of that decision as any authority for the instant question.

Petter v. Fidelity & Casualty Co.,⁹ as stated by Judge Faris, is authority only for the proposition that when the plaintiff under an accident policy has made out a *prima facie* case of accidental death the burden is on the company to show that it resulted from natural causes.

*Whitfield v. Aetna Life Ins. Co.*¹⁰ was disposed of as being of only persuasive force. James Whitfield was insured under an accident policy for \$5,000 in case of accidental death with the proviso that the insurer should be liable for only one-tenth that amount in case of death due to injuries intentionally inflicted, sane or insane. The case was tried upon

¹(1919) 212 S. W. 8.

²(1919) 213 S. W. 45.

³(1919) 213 S. W. 869.

⁴*Scales v. National Life & Accident Ins. Co.* (1919) 212 S. W. 1. c. 10; *Brunswick v. Standard Accident Ins. Co.* (1919) 213 S. W. 1. c. 48.

⁵*Brunswick v. Ins. Co.* (1919) 213 S. W. 1. c. 47; *Scales v. Ins. Co.* (1919) 212 S. W. 1. c. 8.

⁶*Scales v. Ins. Co.* (1919) 212 S. W. 1. c. 10; *Brunswick v. Ins. Co.* (1919)

213 S. W., 1. c. 48.

⁷*Scales v. Ins. Co.* (1919) 212 S. W. 1. c. 10.

⁸*Logan v. Casualty Co.* (1898) 146 Mo. 114, 47 S. W. 948.

⁹*Petter v. Casualty Co.* (1902) 174 Mo. 1. c. 269, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560.

¹⁰*Whitfield v. Aetna Life Ins. Co.* (1907) 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895.

the agreed fact that the insured died "from bodily injuries caused by a pistol shot intentionally fired by himself, for the purpose of thereby taking his own life; that the cause of the death of said Whitfield was suicide." The insurer was held liable for the full amount; the reduction to one-tenth of the liability being a defense within the prohibitive terms of the statute. The force of the decision as a precedent in our case depends on whether James Whitfield was sane at the time he took his life. No decisive statement as to his sanity appears. Faris, J., was of the opinion that plaintiff's reply admitted his sanity and that the court fell into error of considering suicide while sane an accident.

The question in *Laessing v. Traveler's Protective Association of America*²¹ and *Reynolds v. Maryland Casualty Co.*²² was whether death was due to natural causes or accidental causes or to injuries self inflicted while sane. The cases go extensively into the presumptions and burden of proof under these circumstances, but furnish no criterion as to the effect of the statute when a sane man has taken his life.

The decision in *Knights Templars' and Masons' Life Indemnity Co. v. Jarman*²³ was upon the stipulated fact that the insured was insane when he killed himself.

Roy, C., speaking of *Applegate v. Travelers' Ins. Co.*,²⁴ in his opinion in *Scales v. Ins. Co.*,²⁵ says: "The plain truth is that courts and counsel in all those cases proceeded on the theory that, under the Logan case, suicide by a sane person was an accident covered by an accident policy." But in the Applegate case Reynolds, J., made the statement: "This however is not a case of accident but of design—a case of suicide by poison." The decision was that by Section 6945 R. S. Mo. 1909 the beneficiary under an accident policy could recover altho the insured had taken his life while sane. *This is not an accident.* That case, therefore, is squarely in conflict with the decisions under consideration.

If the legislative intent in the suicide statute is that suicide *simply because it is suicide* may never become a defense—that is, if the emphasis is to be put on the exact words "suicide shall be no defense," a narrow and technical argument may be advanced against the decisions.

In an action on an accident policy the plaintiff must make out a *prima facie* case of accident.²⁶ In any case where from the facts death may have been the result of either accident or of selfkilling while sane a presumption arises against the latter.²⁷ True under *Laessing v. Ins.*

²¹*Laessing v. Ins. Co.* (1902) 169 Mo. 280, 69 S. W. 469.

²²*Reynolds v. Casualty Co.* (1918) 274 Mo. 83, 201 S. W. 1128.

²³*Knights Templar v. Jarman* (1902) 187 U. S. 197, 23 Sup. Ct. 108, 47 L. Ed. 139.

²⁴(1910) 153 Mo. App. 63, 132 S. W. 2.

²⁵(1919) 212 S. W. 1. c. 10.

²⁶*Laessing v. Travelers Protective Ass'n.* (1902) 169 Mo. 272, 69 S. W. 469; *Travelers Ins. Co. v. McConkey* (1902) 127 U. S. 661; 32 L. Ed. 308.

²⁷*Reynolds v. Casualty Co.* (1918) 274 Mo. 1. c. 96, 201 S. W. 1131, 14 R. C. L. 1236.

Co., *supra*, the presumption that death was not by the hand of the insured does not relieve the plaintiff from establishing that death was accidental. Death might have been natural. But few cases where there is a real question whether death was due to accident or suicide while sane will present any difficulty to the plaintiff in establishing that death in any event was not natural. Presumptions in law refer to the burden of going forward with the evidence.¹⁴ The plaintiff now has a *prima facie* case of accident and the burden would be upon the defendant to come forward with evidence that death was due to suicide while sane. A defense is a general assertion that the plaintiff has no cause of action, a denial of the truth and validity of the complaint.¹⁵ Thus, any proof of suicide while sane would be a denial of the truth and validity of the complaint in which plaintiff alleges that death was due to accident and hence a defense. But the exact words of the statute are suicide shall be "no defense," and it would effectually bar any evidence to overcome the presumption against suicide and that presumption will be decisive of the case until overcome by evidence which shall outweigh the presumption.¹⁶ The plaintiff would recover on his *prima facie* case, the defendant being unable to rebut it.¹⁷

The purpose of the statute, as applied to accident insurance, was to prevent insurance companies from excepting from liability a particular accident, viz: accidental suicide. The purpose was not to prevent insurance companies, writing accident insurance, from stipulating that they would not be liable for something not an accident. Intentional self destruction by a sane man is clearly not an accident. Self destruction while insane is an accident.

The conclusion that the decisions under review are sound cannot be escaped. Their effect is to add despite the statute an element to the *prima facie* case the plaintiff must produce. Wherever the facts balance between self killing while sane and accident the decisions do not disturb the presumption which rises against the former.¹⁸

But where a plaintiff seeks to recover under an accident policy, the insured having taken his own life, evidence must be produced of the insanity of the deceased, at the time of his death, because in absence of evidence the law presumes a man sane,¹⁹ and the burden is with the plaintiff to overcome this presumption.²⁰

¹⁴ 4 Wigmore on Evid. 2490-2511; *State v. Hudspeth* (1900) 159 Mo. 178; 60 S. W. 136.

¹⁵ Bouvier's Law Dict., Rawle's 3rd ed.

¹⁶ *Standard Life Ins. Co. v. Thornton* (1900) 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116.

¹⁷ *Kelley v. Jackson* (1832) 6 Pet. (U. S.) 622, 632, 8 L. Ed. 523.

¹⁸ 14 R. C. L. 1236; *Reynolds v. Casualty Co.*, (1918) 274 Mo. 1. c. 96, 201 S. W. 1131.

¹⁹ *Mutual Life Ins. Co. v. Terry* (1872) 15 Wall. 580, 21 L. Ed. 236; *Reynolds v. Casualty Co.*, *supra*.

²⁰ *Blackstone v. Ins. Co.* (1889) 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486.

The degree of insanity necessary to make self destruction accidental,²⁶ becomes of moment. In jurisdictions having no "suicide statute" a provision avoiding liability "in case of suicide" is construed to allow recovery where deceased was insane.²⁷ These cases, construing such a provision and laying down a test as to when deceased was sane and when insane at time of self-destruction would seem to furnish a guide.

Suicide raises no presumption of insanity nor is it *prima facie* evidence of insanity.²⁸ But the manner of the act and all its circumstances may be considered in determining the question of insanity.²⁹

Not every degree of insanity would seem to be sufficient.³⁰ Mental disorder at least is necessary.³¹ The courts of this country have followed, in the main, either the English rule or the rule of the Federal Courts.

The English cases of *Borradaile v. Hunter*³² and of *Dormay v. Borradaile*³³ stated the rule to be that the deceased must be of so unsound a mind as to be unaware that his act will lead to his self destruction. It is not sufficient that he was incapable of recognizing its moral obliquity. This rule seems to be followed in New York,³⁴ Massachusetts,³⁵ Vermont,³⁶ and Kentucky.³⁷ To the rule as laid down in New York and Vermont³⁸ the qualification is found that if deceased is compelled to take his own life by an irresistible insane impulse his act is not intentional suicide.

The rule of the Federal Courts and of a majority of the states,³⁹ tho somewhat variant in terms,⁴⁰ makes the test upon the ability of the in-

²⁶*Accident Ins. Co. v. Crandel* (1886) 120 U. S., 1. c. 531; 7 Sup. Ct. 685, 30 L. Ed. 740.

²⁷*Bigelow v. Ins. Co.* (1876) 93 U. S. 284, 23 L. Ed. 918; *Knickerbocker Ins. Co. v. Peters* (1875) 42 Mo. 414.

²⁸*Weed v. Mutual Benefit Life Ins. Co.* (1877) 70 N. Y. 561. But see *Coffee v. Home Ins. Co.*, 3 Jones & S. 314, saying that it might go to remove the presumption of sanity. The question of insanity is one for the jury. (95 U. S. 223, 24 L. Ed. 433.) Insanity must exist at the time of self destruction to excuse suicide, and it is insufficient to show that the insured was insane at other times (55 Ga. 103). The fact that a juror considers suicide as conclusive evidence of insanity is good cause for a challenge (2 Dill 572, note).

²⁹*Ritter v. Mutual Life Ins. Co.* (1895) 69 Fed. 505; *Grand Lodge Order of Mutual Aid v. Weisling* (1897) 168 Ill. 408, 68 Am. St. Rep. 123, 48 N. E. 59.

³⁰IV Cooley's Briefs on the Law of

Insurance 3245.

³¹*Moore v. Conn. Mutual Life Ins. Co.* (1874) 3 Flipp. 36.

³²(1843) 5 Man. & G. 639, 44 E. C. L. 335.

³³(1848) 5 C. B. 380, 11 Jur. 231.

³⁴*Von Zandt v. Mutual Benefit Life Ins. Co.* (1873) 55 N. Y. 169; 15 Am. St. Rep. 215.

³⁵*Cooper v. Ins. Co.* (1869) 102 Mass. 227, 3 Am. Rep. 551.

³⁶*Hathaway v. National Life Ins. Co.* (1875) 48 Vt. 335.

³⁷*Masonic Life Assoc. v. Pollard's Guardian* (1905) 89 S. W. 219, 28 Ky. Law Rep. 335.

³⁸(1875) 48 Vt. 336.

³⁹84 Am. St. Rep. 1. c. 547; Vance on Insurance p. 521.

⁴⁰Conscience and will overpowered. *Knickerbocker Life Ins. Co. v. Peters* (1875) 42 Md. 414. Act free from all immorality and action entirely blameless. *Life Assoc. of Am. v. Waller* (1886) 77 Ga. 533. Incapable of form-

sured to realize the moral quality of his act.⁴⁰ This rule has been followed in Illinois,⁴¹ Michigan,⁴² Indiana,⁴³ Texas,⁴⁴ Ohio,⁴⁵ Washington,⁴⁶ and Minnesota.⁴⁷ Jurisdictions following this rule have qualified it by holding that where the deceased was driven by an irresistible insane impulse to take his life, it was not intentional suicide.⁴⁸

A third rule has been adopted in a few jurisdictions that in as much as suicide is a criminal act, self destruction should occur while there is mental capacity to form a criminal intent to relieve the insurer from liability.⁴⁹ This test would seem equivalent to the Federal rule. A man unconscious of the moral consequences and effect of his act cannot commit a felony, tho he may take his life with the set purpose of doing so and conscious of the physical consequences.

In criminal cases Missouri courts have adopted knowledge of right and wrong as the test of insanity which will form a defense, tho they have specifically rejected the uncontrollable insane impulse.⁵⁰

Where an insurer has not contracted for liability in case of intentional injuries a construction which holds an injury intentional where there was a knowledge that the act would produce the result may be valid. But mental unsoundness rarely attains such degree that the sufferer does not know that fire will burn, knives cut, or water drown him. The intent to live is not formed on the knowledge of these results alone. It is as complex as life. The consequences of suicide to "himself, his character and his family"—the right and wrong of the act are far more important in forming the intent. Since an accidental act is spoken of as

ing a rational judgment with regard to self destruction. *Hiatt v. Mutual Life Ins. Co.* (1873) 2 Dill. 572, note.

⁴⁰(1872) 15 Wall. 580, 21 L. Ed. 236.

⁴¹*New Home Life Assoc. v. Hagler* (1862) 29 Ill. 437.

⁴²*Blackstone v. Standard Life Ins. Co.* (1889) 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486.

⁴³*Michigan Mutual Life Ins. Co. v. Naugh* (1891) 130 Ind. 79, 27 N. E. 393.

⁴⁴*Mutual Life Ins. Co. v. Walden* (1894) (Tex. Civ. App.) 26 S. W. 1012.

⁴⁵*Schultz v. Ins. Co.* (1883) 40 Oh. St. 217.

⁴⁶*Knapp v. Order of Pendo* (1905) 36 Wash. 601, 79 Pac. 209.

⁴⁷*Scheffer v. Ins. Co.* (1879) 25 Minn. 534.

⁴⁸*Ins. Co. v. Terry* (1872) 15 Wall. 580; *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209. The leading statement of the rule and one which is

often used verbatim as an instruction, is found in *Ins. Co. v. Terry*, *supra*. In *Ritter v. Ins. Co.* (1895) 28 U. S. Ap. 612, 70 Fed. Rep. 954, an understanding of the moral consequences is said to be such understanding as a sane man would have of the effect of the act on himself, his character, and his family, and the wrongfulness of it. In *Manhattan Life Ins. Co. v. Broughton* (1883) 3 Sup. Ct. 99, Judge Gray approves the Federal rule, declaring it simpler in that it does not involve the subtle and vexing question of how much the exercise of will can be attributed to a man so unsound mentally that he cannot distinguish right from wrong.

⁴⁹*Phadenhauer v. Germania Life Ins. Co.*, (1872) 7 Heisk. 567, 19 Am. Rep. 623; *Bagley v. Alexander*, East's Notes, Case 79, Morley's India Dig. 352.

⁵⁰*State v. Pagels* (1887) 92 Mo. 300; *State v. Riddle* (1912) 245 Mo. 451.

contrary to the intent it would seem that it should be contrary to those elements which constitute intent and it is submitted that when insanity has overthrown the knowledge of moral consequences and of right and wrong, self destruction is not in any just sense an intentional act,—but rather is contrary to intent and an accident.

J. A. W.

PROHIBITION—RIGHT OF STATE TO A CHANGE OF VENUE FROM JUDGE ON GROUND OF PREJUDICE. *State ex rel Attorney General v. John G. Slate.*¹ This case seems to be the first instance in which it has been held in Missouri that the state over the objection of the defendant may take a "change of venue" in a criminal case on the ground of prejudice of the judge.

This was a proceeding in prohibition in which it was sought to have a preliminary rule made permanent restraining the judge of the Circuit Court of Cole County from exercising further jurisdiction in the case of *State v. Scott.*² Scott was charged with embezzlement and grand larceny. The Attorney General at the direction of the Governor had assumed control of the prosecution. Before the jury was impaneled an Assistant Attorney General filed an affidavit alleging that the judge was prejudiced against the prosecution and particularly against attorneys conducting the case for the state. They then moved that a different judge be called to preside at the hearing of the case in accordance with section 5201 R. S. 1909.³ The court overruled the motion. Whereupon, application was made to the Supreme Court for a writ of prohibition.

Respondent contended that irrespective of prejudice the state is not entitled to a "change of venue" in a criminal case. In its decision the Supreme Court held that the writ of prohibition should issue to prevent a judge who was prejudiced against the prosecution from exercising jurisdiction.

The respondent relied on section 22, Art. 2 of the Constitution⁴ which guarantees to the accused "a speedy trial before an impartial jury of the county," contending that this clause constituted a bar to the state

¹(1919) 214 S. W. 85.

²Circuit court of Cole county, Missouri. Case No. 1879.

³"If, in any case, the judge shall be incompetent to sit, for any of the causes mentioned in section 5198, and no person to try the case will serve when elected as such special judge, the judge of such court shall in either case set the case down for trial on some day of the term, or on some day as early as practicable in vacation, and notify and

request another circuit or criminal judge to try the case x x x."

⁴"Rights of Accused in Criminal Prosecution—In criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy, public trial by an impartial jury of the county."

from a "change of venue" without the consent or against the objection of the accused. The position of the relator was, that, without denying this proposition on the question of a change of venue from the county, it did not apply to a change from the judge.

The distinction would seem obvious⁵ and has been repeatedly drawn in Missouri. Thus it is proper to refuse a "change of venue," when the statute directs the calling in of another judge;⁶ or to refuse a transfer to another court in the same county when a "change of venue" is directed.⁷

From the language of section 5198 R. S. 1909⁸ it would seem rather obvious that no distinction is intended to be made between the rights of the state and of the accused when the ground of the application is that the judge is "in anywise interested or prejudiced." By expressly mentioning the defendant in the fourth class of cases in which a judge is deemed incompetent, the logical conclusion is that the legislature intended in the other classes to grant the right either to the state or to the defendant. This conclusion is well nigh irresistible, in the light of the decision of the Supreme Court in the case of *State ex rel. v. Wear*.⁹ In that case the court held that prohibition would issue to prevent Judge Wear from exercising jurisdiction in a case in which his son was defendant.

The question which would seem still to remain open is: *In what manner shall the fact of prejudice and bias be determined?* Is it sufficient that the prosecution shall make an affidavit alleging prejudice?

⁵ "Venue, a neighborhood, place or county in which an injury is declared to have been done, or fact declared to have happened. 3 Bl. Com. 294. Venue also denotes the community in which an action or prosecution is brought to trial, and which is to furnish the panel of jurors. To 'change venue' is to transfer the cause for trial to another county, or district." Black's Law Dictionary. *Moore v. Gardner* (1851) 5 How. Prac. (N. Y.) 243; *Armstrong v. Emmet* (1897) 16 Tex. Civ. App. 242, 41 S. W. 87; *Sullivan v. Hall* (1891) 86 Mich. 7, 48 N. W. 646, 13 L. R. A. 556; *State v. McKinney* (1869) 5 Nev. 194.

⁶ *State v. Parker* (1888) 96 Mo. 382, 9 S. W. 728.

⁷ *State v. O'Bryon* (1891) 102 Mo. 254, 14 S. W. 933.

⁸ "When Judge deemed incompetent to try case—when any indictment or crim-

inal prosecution shall be pending in any circuit court or criminal court, the judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases: First, when the judge of the court in which said cause is being tried is near of kin to the defendant by blood or marriage; or, second, when the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him by blood or marriage; or third, when the judge is in anywise interested or prejudiced, or shall have been counsel in the cause; or, fourth, when the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin to or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial."

⁹ (1895) 129 Mo. 619, 31 S. W. 608.

Doubtless in such circumstances a trial judge would ordinarily decline further jurisdiction and would exercise his right to call in another judge or call a special election under section 5201 R. S. 1909. But suppose the judge denies the allegations of prejudice? Is it contemplated that he shall hear evidence and determine the fact of his own prejudice? It would not seem to be in accord either with the dignity of a judge or with fundamental notions of justice that a man should sit in judgment on his own case.¹⁰ In the fourth class of cases mentioned in section 5198 R. S. 1909 where the defendant alleges prejudice of the judge the legislature has determined the question by providing the exact procedure. The filing of the affidavits in the form prescribed by the statute raises no issue of fact and the court has no discretion.¹¹ In the first three classes of cases no procedure is prescribed. In the case under consideration the application for a writ of prohibition alleged that the circuit judge was prejudiced, and not merely that the prosecuting officer *had filed an affidavit alleging prejudice*. On this allegation an issue of fact was formed and tried by the Supreme Court *exercising original jurisdiction*.¹² The court said:

"Some settled propositions as forewords are apposite. One of these is an axiom of the common law wholly applicatory by the closest analogy, which runs in substance that no man ought to sit in judgment on his own case. The other is that, if the objection of prejudice against the state be raised in a case, such objection must of necessity be raised by the sworn, elected, prosecuting officer of the state; that is, either by the prosecuting

¹⁰See *State v. Jim* (1832) 3 Mo. 147; *State v. Gates* (1855) 20 Mo. 401. In *State v. Witherspoon* (1910) 231 Mo. 1. c. 716 the court said: "The law does not contemplate an issue of fact upon an application for a change of venue on account of the disqualification of the judge, to be heard and determined by the judge alleged to be disqualified and therefore, the evidence offered in support of the application, together with the agreed statement of facts, were not properly in the case and should not be considered. When the application is properly made and supported by affidavit as required by the statute the judge has no discretion. He cannot sit in judgment upon the question of his own disqualification, but must grant the change as applied for." It is true that in this case the application was made by the defendant and was based on the

fourth class of cases in section 5198 R. S. 1909 in which the legislature has prescribed the method of making the application, but the reasoning of the court would seem to have equal application in a case where prejudice and bias in the trial judge were alleged by the state.

¹¹*State v. Witherspoon* (1910) 231 Mo. 706, 133 S. W. 323; *State v. Spivey* (1905) 191 Mo. 87, 90 S. W. 81; *State v. Thomas* (1888) 32 Mo. App. 159. *Contra: State v. Sayers* (1875) 58 Mo. 585 under Act of 1873.

¹²Article x, Section 3 Constitution gives to the Supreme Court power to issue original writs. Prohibition was held to be an original remedial writ within the jurisdiction of the Supreme Court. *Thomas v. Mead* (1865) 36 Mo. 232.

attorney of the county wherein the cause is pending, or by the Attorney General of the State."¹²

But how "raised"? This case does not settle the point, but, in the light of the foregoing statement it would seem that the filing of an affidavit by the prosecuting officer alleging prejudice should leave the trial judge no discretion except to determine the sufficiency of the affidavit as to form. If this is not true it would follow that in such cases the trial judge must try the issue of his own prejudice. If he finds that no prejudice exists, then the state can apply for a writ of prohibition to the Supreme Court. While the Supreme Court clearly has original jurisdiction in such cases, arising out of its inherent supervisory authority over all the courts, yet is it contemplated that the question must always be settled by that body? And if so, should any distinction be made when the allegation of prejudice is made on behalf of the defendant (under the first three classes specified in Sec. 5198) or on behalf of the state?

JESSE E. MARSHALL.

¹²*State ex rel v. Slate* (1919) 214 S. W. 1. c. 89.

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Payment of Debt to Foreign Representatives or Heirs

At common law an executor or administrator has no authority to administer upon any property of the deceased the situs of which is without the state of his appointment. "Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and does not *de jure* extend to other countries."¹ It is, therefore, uniformly held that the domiciliary representative cannot proceed to a foreign state and in his official capacity maintain an action to collect the assets of the deceased located there.² Each

1. Mr. Justice Story in *Vaughn v. Northrup* (1841) 15 Pet. 1, 5.

2. *Naylor's Admr. v. Moffatt* (1859) 29 Mo. 126; *Cabanne v. Skinner* (1874) 56 Mo. 357; *Gregory v. McCormick* (1895) 120 Mo. 657, 25 S. W. 565; *Sommer v. Franklin Bank* (1904) 108 Mo. App. 490, 83 S. W. 1025; *Miller v. Hoover* (1906) 121 Mo. App. 568, 97 S. W. 210. See also *Beattie Mfg. Co. v. Gerardi* (1919) 214 S. W. (Mo. Sup.) 189.

Where, however, the defendant fails to object to the prosecution of the suit by the foreign representative, either by demurrer or answer, he cannot raise the question on appeal. *May v. Burk* (1883) 80 Mo. 675; *Gregory v. McCormick* (1893) 120 Mo. 657, 25 S. W. 565; *Sommer v. Franklin Bank* (1904) 108 Mo. App. 490, 83 S. W. 1025; *Beattie Mfg. Co. v. Gerardi* (1919) 214 S. W. (Mo. Sup.) 189.

The rule that a foreign domiciliary representative cannot sue in Missouri upon a claim due the deceased does not prevent his maintaining an action in Missouri upon a judgment secured by him in his representative capacity in another state, the judgment debtor having moved to this state. *Hall v. Harrison* (1855) 21 Mo. 227; *Tiltman v. Thornton* (1891) 107 Mo. 500, 17 S. W. 979. It is said in the latter case that under such facts, the foreign representative should sue in his own name as trustee of an express trust.

Likewise, the foreign representative can sue in Missouri, in his own name upon a contract made with him as such representative. *Abbott, Admr. v. Miller, Admx.* (1846) 10 Mo. 141; *Wolf v. Sun Ins. Co.* (1898) 75 Mo. App. 306.

In *Richardson v. Busch* (1906) 198 Mo. 174, 188, 95 S. W. 894, Valiant, J. propounds this question: "A man owns a farm just across our line in Kansas on which he has a herd of cattle; he dies and an admin-

sovereign state reserves to itself the power to grant letters of administration which shall operate *exclusively* upon all assets within its jurisdiction.

It is equally true, however, that the personal property of a decedent passes to his distributees according to the law of domicile, regardless of the situs of such property.³ Influenced no doubt by this principle, the great weight of authority is to the effect that the domiciliary executor or administrator has title to all of the personalty of the decedent, wherever situated, even though he cannot maintain an action for the foreign assets.⁴ This

istrator is appointed and qualified in Kansas and takes possession of the estate; the legal title to the herd of cattle vests in the Kansas administrator, but some one leaves the gate open and the cattle stray across the line into Missouri and some one here takes possession of them; does the act of the cattle in straying across the line extinguish the title of the Kansas administrator, or are the doors of our courts closed against him if he seeks to recover his own." It would seem clear that in such case where the Kansas administrator has reduced the property to possession in his own state, the courts of Missouri would be open to him to protect his title. *Miller v. Hoover* (1906) 121 Mo. App. 568, 571-2, 97 S. W. 210; *Hill v. Barton* (1916) 194 Mo. App. 325, 188 S. W. 1105. As said in *Abbott, Admr. v. Miller, Admx.* (1846) 10 Mo. 141, "A valid title to property acquired in one country, according to the local law, will be deemed valid and respected as a perfect title in every civilized country."

By statute (Sec. 1737, R. S. Mo. 1909) a foreign executor or administrator may sue in Missouri on a cause of action which has accrued under the laws of another state where, by such laws, such representative is alone authorized to maintain the suit. See *Voris v. C. M. & St. P. Ry. Co.* (1913) 172 Mo. App. 125, 157 S. W. 835.

3. The Missouri statute to this effect (Sec. 260, R. S. Mo. 1909) enacted in 1845 (R. S. 1845, p. 102, Sec. 19) is merely declaratory of the common law. *Richardson v. Lewis* (1886) 21 Mo. App. 531; *Austin's Estate* (1897) 73 Mo. App. 61, 66; *Comerford v. Coulter* (1899) 82 Mo. App. 362, 365; *Wyatt, Admr. v. White* (1915) 192 Mo. App. 551, 557, 183 S. W. 1107.

4. *McLain v. Parker* (1913) 88 Kan. 873, 131 Pac. 153; *Compton's Admr. v. Borderland Coal Co.* (1918) 179 Ky. 695, 201 S. W. 20; *Rand, Adm. v. Hubbard* (1842) 4 Met. 252, 258; *In re Washburn's Estate* (1891) 45 Minn. 242, 47 N. W. 790; *In re Cape May & D. B. N. Co.* (1881) 51 N. J. L. 78, 16 Atl. 191; *Petersen v. The Chemical Bank* (1865) 32 N. Y. 21; *Schluter v. Bowery Sav. Bank* (1889) 117 N. Y. 125, 22 N. E. 572; *Harper v. Butler* (1829) 2 Pet. 239; *Williams v. Ellett* (1882) 108 U. S. 256, 2 S. C. 641; *Owsley v. Central Trust Co.* (1912) 196 Fed. 412, 418.

Contra, Murphy v. Crouse (1901) 135 Cal. 14, 66 Pac. 971; *Walker v. Welker* (1894) 55 Ill. App. 118, 122; *Dial v. Tappan* (1880) 14 S. C. 573. And see *Brown, Jr. v. Smith* (1906) 101 Me. 545, 64 Atl. 915.

rule is stated in this state in the recent case of *State ex rel. Abercrombie v. Holtcamp*,⁵ although earlier cases incline to the opposite view.⁶

With the foregoing rules in mind, let us assume that a non-resident of this state dies owning a note made by a resident of this state. Can the local debtor safely pay his debt to the non-resident executor, administrator or legal distributees of the decedent's estate? If such payment be made, may such party nevertheless be compelled to account for such debt to an ancillary administrator subsequently appointed in Missouri?

Payment to the foreign representative. As stated above, it is generally held that the domiciliary representative has title to all of the assets of the deceased, regardless of the situs thereof. It should follow that payment by a local debtor to such representative constitutes a valid discharge of the indebtedness. The fact that the foreign representative could not institute suit in this state and thus enforce payment to him should not affect the situation since this result is not due to any infirmity in the foreign representative's title to the asset, but is based on a mere personal incapacity to sue.⁷ The situation might be different, of course, if, prior to the payment, an ancillary administrator had been appointed in Missouri and the local debtor informed of such fact.⁸ The power of this state to appoint an administrator to take charge of the assets in this jurisdiction cannot be questioned.⁹

5. (1916) 267 Mo. 412, 421, 185 S. W. 201.

6. *Naylor's Adm. v. Moffatt* (1859) 29 Mo. 126; *Crohn v. Clay County State Bank* (1909) 137 Mo. App. 712, 118 S. W. 498. See also *McCarty v. Hall* (1850) 13 Mo. 480.

7. *Williams v. Ellett* (1882) 108 U. S. 256, 2 S. C. 641.

8. See *Maas v. German Savings Bank* (1903) 176 N. Y. 377, 68 N. E. 658, where it is held that the appointment of a local administrator prior to the date of payment to the foreign administrator is immaterial if the local debtor did not have knowledge of such appointment at the time he made such payment. In *Citizens Nat. Bank v. Sharp, Admr.* (1880) 53 Md. 521, it is said that the validity of the payment to the foreign representative is dependent upon the non-existence of local administration.

9. The situs for purposes of administration of simple contract debts and of promissory notes owing by residents of this state to non-resident deceased creditors is within this state. *McCarty v. Hall* (1850) 13 Mo. 480; *In the Matter of Partnership Estate of Henry Ames & Co.* (1873) 52 Mo. 290; *Becraft v. Lewis* (1890) 41 Mo. App. 546. Likewise a judg-

If, however, prior to such appointment, the local debtor pays the domiciliary representative who then has title to the asset, a local administrator subsequently appointed should not be able to compel a second payment.

The great weight of authority supports the view just expressed. It is generally held that payment to the domiciliary representative is valid and constitutes a discharge of the debt.¹⁰ The reasoning of the courts is well stated in *In re Williams' Estate*.¹¹ In this case the domiciliary administrator appointed in Iowa had compromised with a non-resident corporation a cause of action for the negligent killing of the deceased, the accident

ment rendered in a foreign state against a person then a resident of such state, but now a resident of Missouri has upon the death of the plaintiff a situs in this state for purposes of administration. *Miller v. Hoover* (1906) 121 Mo. App. 568, 97 S. W. 210. For a discussion of this case see 20 Harvard Law Rev. 326.

10. *Marcy v. Marcy* (1864) 32 Conn. 308, 320; *Selleck v. Rusco* (1878) 46 Conn. 370; *Bull v. Fuller* (1889) 78 Ia. 20, 42 N. W. 572; *In re Williams' Estate* (1906) 130 Ia. 553; 107 N. W. 608; *Ames v. Citizens Nat. Bank* (1919) 181 Pac. (Kan.) 564; *Fidelity Trust Co. v. Williams* (1907) 32 Ky. L. R. 303, 105 S. W. 952; *Compton's Admr. v. Borderland Coal Co.* (1918) 179 Ky. 695, 201 S. W. 20; *Thorman v. Broderick* (1900) 52 La. Ann. 1298, 27 So. 735; *Citizens Nat. Bank v. Sharp, Admr.* (1880) 53 Md. 521; *Hutchins, Adm. v. State Bank* (1847) 12 Met. 421; *Gardiner v. Thorndike* (1903) 183 Mass. 81, 66 N. E. 633; *Morrison v. Hass* (1918) 229 Mass. 514, 118 N. E. 893; *In re Washburn's Estate* (1891) 45 Minn. 242, 47 N. W. 790; *Dexter v. Berge* (1899) 76 Minn. 216, 78 N. W. 1111; *In re Cape May & D. B. N. Co.* (1881) 51 N. J. L. 78, 16 Atl. 191; *Williams v. Storrs* (1822) 6 Johns. Ch. 353, 357; *Doolittle v. Lewis* (1823) 7 Johns. Ch. 45, 49; *Parsons v. Lyman* (1859) 20 N. Y. 103, 112-113; *Schluter v. Bowery Sav. Bank* (1889) 117 N. Y. 125, 22 N. E. 572; *Maas v. German Savings Bank* (1903) 176 N. Y. 377, 68 N. E. 658; *Gray's Estate* (1887) 116 Pa. St. 256, 11 Atl. 66; *In re Schinn's Estate* (1895) 166 Pa. St. 121, 30 Atl. 1026; *Amsden v. Danielson* (1895) 18 R. I. 787, 31 Atl. 4; *State to use of Bank of Wayne v. Fulton* (1898) 49 S. W. (Tenn. Ch. App.) 297; *Mackey v. Cox* (1855) 18 How. 100, 104; *Wilkins v. Ellett* (1869) 9 Wall. 740; *idem* (1882) 108 U. S. 256, 2 S. C. 641.

In *Riley v. Moseley, Admr.* (1870) 44 Miss. 37, it was held that where a resident of Mississippi paid his debt to the domiciliary representative in Tennessee, both parties being in Tennessee at the time of payment, the debt was discharged because at such time the debtor was subject to suit in Tennessee since he was personally within that state. Cf. *Klein v. French* (1880) 57 Miss. 662, 669; *City Savings & Trust Co. v. Branchiere* (1916) 111 Miss. 774, 72 So. 196.

11. (1906) 130 Ia. 553, 107 N. W. 608.

having taken place in Michigan. In upholding the payment to the domiciliary representative (the appellee) the court said: "The appellee, as principal administrator, took title at once to the entire personal estate of the deceased, wherever situated. True his letters of authority did not entitle him to go into a foreign state and enforce his rights by action in the courts, but they did authorize him to take possession of the assets of the estate wherever found, if he could do so peaceably, and to receive payment of debts and claims due to the estate wherever the same was voluntarily made, and his quittance or discharge given therefor was valid against the claim of an ancillary administrator subsequently appointed."

A few courts have held, however, that payment to a foreign representative is without legal effect.¹² The Missouri decisions, while not in accord, seem to incline to the latter view. The cases will be stated in their chronological order.

Bartlett v. Hyde.¹³ One Garrett who apparently was a resident of Kentucky, died in Missouri and certain money belonging to him came into the defendant's possession. The plaintiff was appointed administrator in this state on November 9th, and three days later an administrator was appointed in Kentucky. In an action brought by the Missouri administrator to recover the money left by the deceased, the defendant offered to prove that he had paid the Kentucky administrator and that all of the expenses of the last illness were paid. The lower court refused to admit such evidence and judgment was rendered for the plaintiff. The ruling was affirmed on appeal. The court seemed to disregard the fact that payment had been made to the legal representative of the deceased's estate and treated the case as if the defendant had endeavored to make distribution of the decedent's assets without administration. This, the court said, could not be

12. *Ferguson v. Morris* (1880) 67 Ala. 389, 395; *Equitable Life Assurance Soc. v. Vogel's Executrix* (1884) 76 Ala. 441, 447; *Walker v. Welker* (1894) 55 Ill. App. 118; *Young, Adm. v. O'Neal* (1855) 3 Sneed (Tenn.) 55; *Vaughn v. Barret* (1833) 5 Vt. 333. In *McCully v. Cooper* (1896) 114 Cal. 258, 46 Pac. 82 and in *Klein v. French* (1880) 57 Miss. 662, 669, it is said that payment to a foreign representative may be good if there be no local creditors and no local administration.

13. (1834) 3 Mo. 490.

done. It should be noted that in this case an administrator had been appointed in Missouri before the defendant paid the domiciliary representative. Since the defendant did not plead or offer to prove that he made his payment in ignorance of the appointment in this state, it may perhaps be inferred that he had knowledge of such appointment prior to such payment.

*Crohn v. Clay County State Bank.*¹⁴ A resident of Iowa died leaving two deposits in Missouri banks—one in Jackson County and the other in the defendant bank in Clay County. About a month after the date of death, the defendant paid the domiciliary administrator in Iowa the sum on deposit in defendant's bank. Shortly thereafter the public administrator of Jackson County was appointed administrator of the decedent's estate, and, after collecting the deposit in the Jackson County bank, filed suit against defendant for the account paid by it to the Iowa administrator. There was no showing that the deceased owed any debts in Missouri. The Kansas City Court of Appeals held that notwithstanding the defendant's prior payment, the plaintiff was entitled to recover. The decision was rested on the ground that the Iowa administrator had no title to the Missouri assets.

*Troll v. Landgraf.*¹⁵ A resident of Illinois died owning negotiable promissory notes made by residents of Missouri and secured by deeds of trust on Missouri real estate. The Illinois administrator distributed these notes among the heirs. Prior to final settlement, however, the public administrator of St. Louis filed notice that he had taken charge of the estate of the deceased in Missouri, and made demand upon the Illinois administrator for the notes in question. The latter, "as a son and one of the heirs at law" of the decedent, filed a petition in the Probate Court of the City of St. Louis to set aside and vacate the authority of the public administrator to administer upon any part of the estate. It was held by the St. Louis Court of Appeals that the public administrator had no right to take charge of the estate; that under the facts the property was not left "in a situation exposed to loss or damage" or "liable to be injured, wasted or

14. (1909) 137 Mo. App. 712, 118 S. W. 498.

15. (1914) 183 Mo. App. 251, 168 S. W. 268.

lost" and that, therefore, the statute¹⁶ did not authorize administration by the public administrator.

*Bell v. Farmers & Traders Bank.*¹⁷ A resident of Iowa died leaving a deposit in the defendant bank in Missouri. No administrator being appointed, the defendant paid the account to the heirs at law, part of whom lived in Missouri and part in Iowa. Thereafter the plaintiff was appointed administrator in Missouri, and instituted this action to collect the account. The plaintiff's contention was that administration was necessary before the heirs of the decedent could acquire any title to the account, and that the defendant's payment to the heirs afforded it no protection whatever. The St. Louis Court of Appeals rejected this view and held that in the absence of any debts the heirs could, without administration, distribute among themselves the assets of the deceased.

*Troll v. Third National Bank of St. Louis.*¹⁸ The public administrator of St. Louis county filed a petition alleging that one Lucia M. Laird, a resident of Illinois, died owning thirty-three shares of stock in the defendant bank, the stock certificate being in the possession of the executrix in Illinois; that plaintiff, as ancillary administrator appointed in this state, had title to the stock and was entitled to all dividends declared thereon since the date of death of the stockholder. The prayer was that the defendant be ordered to deliver to the plaintiff, as administrator, a certificate for the stock, and to pay to the plaintiff all dividends declared since the stockholder's death. The defendant bank demurred to the petition. The Supreme Court held (the decision being *in banc*) that the demurrer should be overruled. Inasmuch as there were assets in this state,¹⁹ the court held that the

16. Sec. 302, R. S. Mo. 1909.

17. (1915) 188 Mo. App. 383, 174 S. W. 196.

18. (1919) 211 S. W. (Mo. Sup.) 545. This decision is followed without discussion in the very recent cases of *Troll v. Third National Bank* (1919) 216 S. W. (Mo. Sup.) 922; *Troll v. United Railways Co.* (1919) 216 S. W. (Mo. Sup.) 923; *Troll v. National Bank of Commerce* (1919) 216 S. W. (Mo. Sup.) 923.

19. The situs for purposes of administration of stock in a Missouri corporation is within the state, regardless of the domicil of the owner. *Richardson v. Busch* (1906) 198 Mo. 175, 95 S. W. 894. The contrary

public administrator had authority to administer thereon. The case of *Troll v. Landgraf*, *supra*, holding that the public administrator was not authorized to act under the statute because the property in this state was being properly cared for and was not actually in danger, was not cited, but the decision was in effect rejected for the court, in construing the statute said, "Any estate with no administrator to look after it is exposed to loss. We think this clause clearly authorized the public administrator to act."²⁰ The court did not attempt to distinguish between the stock in the defendant bank and the dividends thereon declared since the decedent's death and paid to the foreign executrix. The ruling in *Crohn v. Clay County State Bank*, *supra*, which would require a second payment to the local administrator was, therefore, tacitly approved.

The foregoing cases seem to be the only ones in this state having a direct bearing upon this subject. No two of them approach the question from quite the same angle, and each stands practically alone so far as relying upon the others is concerned. While *Crohn v. Clay County State Bank* deals with the question most directly, this decision has been cited but once since it was rendered, and then not on the point under discussion. None of the four earlier cases is referred to in *Troll v. Third National Bank*.

The ruling in *Crohn v. Clay County State Bank* has resulted in considerable hardship in many cases where non-residents

rule prevails in Kansas where it is held that the situs of stock in a corporation of that state is at the domicil of the deceased stockholder. *In re Miller's Estate* (1913) 90 Kan. 819, 136 Pac. 255.

20. The language quoted from *Troll v. Third National Bank* is squarely opposed to the reasoning in *Troll v. Landgraf*, referred to above. In the latter case the St. Louis Court of Appeals said: "We think it altogether absurd to say that there was property of the deceased left in this state exposed to loss or damage. The situation was one entirely agreeable to those in interest and there was no occasion whatsoever for the public administrator or anyone else to interfere." For a discussion of the Missouri statute by Cooley, C. J., see *Reynolds v. McMullen* (1885) 55 Mich. 568, 22 N. W. 41.

As to the right of the public administrator to administer upon personalty brought into the state after the decedent's death see *McCabe v. Lewis* (1882) 76 Mo. 296; *Turner v. Campbell* (1907) 124 Mo. 133, 101 S. W. 119; *Hill v. Barton* (1916) 194 Mo. App. 325, 188 S. W. 1105.

have died leaving deposits in Missouri banks or owning other assets situated in this state. If the local debtor cannot safely pay the domiciliary representative of the decedent's estate, ancillary administration in Missouri becomes a necessity. This frequently entails expense and delay out of all proportion to the amount involved. Whether or not the decision is correct on principle is, therefore, a natural inquiry.

The court in the *Crohn* case states that its decision is justified "by the duty which a state owes its own citizens who may be creditors, as well as to itself in the way of taxation."²¹ So far as the latter point is concerned, it should not be entitled to great weight. This state has the unquestioned right to enact any legislation necessary to enable it to collect taxes upon the property of non-resident decedents located in this jurisdiction, and, within the last few years, it has exercised this right. Section 11 of the Inheritance Tax Law²² imposes severe penalties upon any resident who pays a debt or delivers property to the foreign representatives of a decedent's estate without giving notice to the proper officials and either securing their consent to such payment or delivery or retaining an amount sufficient to pay any tax which may be assessed. In view of this legislation, it is certainly no longer necessary to hold that payment to the foreign representative is ineffective because a different view might result in the debt's escaping taxation in this state. The simple and direct way to insure the collection of any taxes due lies in compelling the local debtor to see that such taxes are paid, not by holding that, after the local debtor has paid the foreign representative, such payment is without effect.

The other ground given for the decision in *Crohn v. Clay County State Bank* is that the duty which a state owes its own citizens who may be creditors of the non-resident decedent requires the holding that payment to the foreign representative be deemed ineffective. Under this reasoning, since payment to a local administrator is granted in order to protect local creditors, it would seem that the existence of such creditors should be a

21. (1909) 137 Mo. App. 712, 715, 118 S. W. 498.

22. Laws of Missouri, 1917, p. 119.

prerequisite to the appointment of an administrator. This, however, is not the law in this state. The existence of local creditors is immaterial,²³ the decisive factor being the existence of assets within the state.²⁴ In the *Crohn* case for instance it did not appear that there were any creditors of the deceased in this state.

In actual practice there is no necessity for the rule in order to protect possible domestic creditors. If there are such creditors and they desire local administration upon any asset within the state they should procure the appointment of an administrator and should advise any local debtor of such appointment before the latter pays his debt to the non-resident domiciliary representative. If such an appointment has not been made, or if it has been made but the local debtor has not been informed of such fact, payment by the latter to the domiciliary representative should be sustained. Under such circumstances the debtor has not only paid the person whom he naturally would pay under the circumstances, but he has paid the person who, under the great weight of authority, had actual title to the asset.²⁵ Such payment should constitute a valid discharge of the indebtedness. A local creditor of the non-resident decedent is put to no great

23. *Richardson v. Busch* (1906) 198 Mo. 174, 95 S. W. 894; *Troll v. Third National Bank* (1919) 211 S. W. (Mo. Sup.) 545; *Becraft v. Lewis* (1890) 41 Mo. App. 546.

24. See the foregoing authorities cited under note 23. See also *Müller v. Hoover* (1906) 121 Mo. App. 568, 97 S. W. 210; *Turner v. Campbell* (1907) 124 Mo. App. 133, 101 S. W. 119.

If the decedent left assets within the state then, it is said by many courts, administration is necessary to protect possible creditors, there being no sure way of determining whether or not creditors exist except through administration. *Becraft v. Lewis* (1890) 41 Mo. App. 546; *Crohn v. Clay County State Bank* (1909) 137 Mo. App. 712, 118 S. W. 498; *McCully v. Cooper* (1896) 114 Cal. 258, 46 Pac. 82; *Brown, Jr. v. Smith* (1906) 101 Me. 545, 64 Atl. 915; *Mansfield v. McFarland* (1902) 202 Pa. 173, 51 Atl. 763. This argument was well answered in *Bell v. Farmers & Traders Bank* (1915) 188 Mo. App. 383, 174 S. W. 196, discussed above, where the court said: "It is true that it is not possible to know with certainty that the deceased left no debts, but it is sufficient on that score if none have appeared and that the administration is not had in order to enable a creditor to reach the assets."

25. See cases cited under note 4.

hardship if he be required to prove up his claim at the domicile of his debtor.²⁶

It has been held in Missouri that a local administrator who collects an account due the estate by a non-resident, is chargeable for such asset as administrator, and not merely as trustee.²⁷ This in itself is a clear recognition of the right of a domiciliary representative to collect the personal assets of the decedent wherever they may be situated. And the general rule that such representative has legal title to all of the assets has been stated recently by the Supreme Court.²⁸ To hold that payment to such representative is valid would be the logical consequence of these decisions.

The decisions in *Bartlett v. Hyde*, *Crohn v. Clay County State Bank* and *Troll v. Third National Bank* may find some support upon the technical ground that the plaintiff's right to the asset sued for could not be challenged in a collateral proceeding. This principle was relied upon in the last mentioned case

26. No distinction should be made between payment to an executor and payment to an administrator. At common law title to a decedent's personalty vested in his executor by force of the will while an administrator's authority was derived from his appointment. See *Ellis v. Ellis* (1905) 1 Ch. 613; *Marcy v. Marcy* (1864) 32 Conn. 308; *Wilson v. Wilson* (1873) 54 Mo. 213; 32 Harvard Law Review 315, 318-319. In *Stagg v. Green* (1871) 47 Mo. 500, it is said that this distinction has not been adopted in the United States and that here even an executor does not derive his power solely from the will, but rather from the court appointing him.

27. *McPike v. McPike* (1892) 111 Mo. 216, 230, 20 S. W. 12. See also *State to use of Bank of Wayne v. Fulton* (1898) 49 S. W. (Tenn. Ch. App.) 297, 301.

28. *State ex rel. Abercrombie v. Holcamp* (1916) 267 Mo. 412, 185 S. W. 201. In *Morton v. Hatch* (1873) 54 Mo. 408, a legatee of a Kentucky testator was allowed to sue upon a debt owed the deceased by a resident of this state. The court held that since administration had been effected in Kentucky, the legatee had title to the asset. This ruling implies the recognition of the domiciliary representative's right to administer upon all of the decedent's assets, wherever situated.

29. *Troll v. Third National Bank* (1919) 211 S. W. (Mo. Sup.) 545, and cases cited; *Green v. Tittman* (1894) 124 Mo. 372, 27 S. W. 391; *Meyer v. Nischwitz* (1917) 198 Mo. App. 101, 199 S. W. 442. Where, however, the appointment is *coram non judice* and void, the validity of the appointment is subject to collateral attack. *Wright v. Hetherlin* (1919) 209 S. W. (Mo. Sup.) 871.

and is, of course, a well settled rule.³⁰ In *Richardson v. Cole*,³¹ however, it was clearly held that where the facts showed that an administrator was not equitably entitled to the asset in controversy, the defendant could plead and prove such facts and that they constituted, not a collateral attack on the administrator's title or power, but an equitable defense to the action.³¹ Likewise, it has been held that where suit is brought by the local administrator for an asset situated without the state, such fact may be shown as a bar to the action.³² Under this reasoning, it might well be held that where a local debtor has in good faith paid the domiciliary representative, such fact may be set up in a suit by an ancillary administrator to show first, an equitable defense, and secondly, that there was no asset within the state at the time suit was instituted.

Payment to the heirs or distributees. The foregoing discussion has been confined to a payment made by a local debtor to a non-resident domiciliary executor or administrator. Suppose that such payment be made direct to the non-resident heirs or distributees of the decedent's estate. Does a payment of this kind stand on the same basis as payment to the legal representative of the decedent's estate?

In *Bell v. Farmers & Traders Bank*,³³ discussed above, the court held that payment to the heirs of the non-resident decedent constituted a defense to an action brought by a local administrator subsequently appointed. To the administrator's contention that he had succeeded to the title to all of the deceased's assets in this state, the court answered that the distributees at all times had the equitable title to the personalty of a decedent, and that where, as here, he left no debts and a distribution had been effected without administration, such distribution should not be set aside in favor of an administrator who would be but a dry trustee of the assets for the distributees.

It is difficult if not impossible to reconcile the rulings in

30. (1901) 160 Mo. 372, 379-380, 61 S. W. 182.

31. To the same effect see *Bell v. Farmers & Traders Bank*, *supra*.

32. *Richardson v. Busch* (1906) 198 Mo. 174, 95 S. W. 894.

33. (1915) 188 Mo. App. 383, 174 S. W. 196.

Bell v. Farmers & Traders Bank and *Crohn v. Clay County State Bank*. In the former case payment by a Missouri debtor to the heirs of the non-resident decedent is held good, while in the latter case payment to the *domiciliary administrator* of the deceased is held ineffective. The title of non-resident heirs to personal property situated in Missouri is certainly not superior to the title of a legally appointed domiciliary executor or administrator. A court which would uphold a payment to the former would do likewise in the case of payment to the latter. The two decisions seem to represent conflicting views of the two courts which rendered them.

Can the ruling in *Bell v. Farmers & Traders Bank* be sustained? The general rule is, of course, that title to personal property passes, upon the owner's death, to his executor or administrator, and not to his heirs or distributees. Thus the former alone can sue for the property or for an injury thereto,³⁴ and this is true even though the deceased left no debts and the claimant is the sole distributee.³⁵ The heirs can only secure title through administration. It has been said that "administration is justifiable if for no other reason than to transfer the title."³⁶ Under this reasoning it would follow that the decision in the *Bell* case was erroneous; that payment to the decedent's heirs or distributees cannot discharge the indebtedness and is wholly without effect since the legal representative alone has title to the asset.

There are, however, important qualifications of the foregoing rules. The title of an executor or administrator is not absolute but exists primarily for two purposes: to pay the debts of the deceased and to distribute the estate among the parties entitled thereto. The representative is in effect a trustee for the

34. *State to use of Coste v. Fulton* (1864) 35 Mo. 323; *Smith v. Denny* (1865) 37 Mo. 20, 23; *Vastine v. Dinan* (1868) 42 Mo. 269, 272; *Green v. Tittman* (1894) 124 Mo. 372, 27 S. W. 391; *State ex rel Hounsom v. Moore* (1885) 18 Mo. App. 406, 411; *Becraft v. Lewis* (1890) 41 Mo. App. 546; *McMillan v. Wacker* (1894) 57 Mo. App. 220; *Jacobs v. Maloney* (1896) 64 Mo. App. 270; *People's Savings Bank v. Hoppe* (1908) 132 Mo. App. 449, 111 S. W. 1190.

35. *Adey v. Adey* (1894) 58 Mo. App. 408. See, however, *Mahoney v. Nevins* (1905) 190 Mo. 360, 88 S. W. 731.

36. *Becraft v. Lewis* (1890) 41 Mo. App. 546, 553.

creditors and distributees. The latter are the equitable owners of the property.³⁷ Consequently it is held that where the debts of the estate are paid, the heirs, prior to an order of distribution, may institute suit against an administrator for breach of his bond.³⁸

More than this, it is now established in this state that under certain circumstances title to personalty may be acquired by the distributees without administration. In the leading case on this point, *Richardson v. Cole*,³⁹ one Lillie Fagin died intestate owning certain personalty in the possession of the defendant Cole. All of the heirs of the deceased made a written assignment of their respective interests in the estate to a sister of the decedent and authorized Cole to deliver the property to said sister. This Cole, the defendant, did. Twelve years later the public administrator took out letters on the estate and instituted suit against Cole and the decedent's sister to recover the property which was in Cole's hands at the time of the deceased's death. It was held that the plaintiff could not recover. While recognizing the rule that an administrator has the legal title to the personalty owned by his intestate, the court held that the equitable title was at all times in the heirs or distributees and that where, as here, there were no debts, and distribution had been effected many years before, an equitable defense was presented to the administrator's claim.

The decision in *Richardson v. Cole* is supported by a number of cases wherein the courts of this state have recognized the title of the heirs or distributees of a decedent without administration on the property.⁴⁰ In *McDowell v. Orphan School*,⁴¹ the

37. *Stagg v. Green* (1871) 47 Mo. 500, 501; *Stagg v. Linnenfelser* (1875) 59 Mo. 336, 341; *Richardson v. Cole* (1901) 160 Mo. 372, 376, 61 S. W. 182; *Mahoney v. Nevins* (1905) 190 Mo. 360, 368, 88 S. W. 731; *McCracken v. McCaslin* (1892) 50 Mo. App. 85, 88; *Troll v. Landgraf* (1914) 183 Mo. App. 251, 259, 168 S. W. 268; *Bell v. Farmers & Traders Bank* (1915) 188 Mo. App. 383, 387-388, 174 S. W. 196.

38. *State ex rel Midgett v. Matson* (1869) 44 Mo. 305; *State to use of Kelley v. Thornton* (1874) 56 Mo. 325.

39. (1901) 160 Mo. 372, 61 S. W. 182.

40. *Craslin v. Baker* (1844) 8 Mo. 437; *State ex rel Midgett v. Matson* (1869) 44 Mo. 305; *Stagg v. Green* (1871) 47 Mo. 500, 501; *State to use of Kelley v. Thornton* (1874) 56 Mo. 325; *Stagg v. Linnenfelser*

heirs, without administration, were permitted to maintain a suit upon a claim owned by their deceased ancestor. In all of these cases the chief requisite to a recognition of the title of the heirs is said to be the absence of any debts owed by the decedent. If the latter died leaving debts, the necessity of administration before the heirs can acquire title is recognized.⁴¹

In *Bell v. Farmers & Traders Bank*, the heirs to whom the Missouri bank turned over the deposit standing in the decedent's name, paid the debts and distributed the remainder among themselves. The public administrator subsequently appointed who sought to hold the bank for a second payment of the deposit did not represent any creditor or other person having any equitable interest in the estate. He had only a personal interest in having the property pass through his hands for the purpose of collecting his fees thereon. The case was, therefore, within the rule laid down in *Richardson v. Cole* where it was said that it would be "a mockery of justice" for a court of equity to require a payment to an administrator "merely for the purpose of allowing him to obtain it and use it and then pay it back to them (the heirs) less his costs and commissions."

Under the cases last referred to it would seem that if a non-resident dies leaving no creditors in Missouri,⁴² a local debtor can safely pay the heirs or distributees of the estate. The

(1875) 59 Mo. 336, 341; *Mahoney v. Nevins* (1905) 190 Mo. 360, 368, 88 S. W. 731; *McCracken v. McCaslin* (1892) 50 Mo. App. 85, 88; *McDowell v. Orphan School* (1900) 87 Mo. App. 386; *Griesel v. Jones* (1906) 123 Mo. App. 45, 99 S. W. 769; *Pullis v. Pullis* (1907) 127 Mo. App. 294, 298, 105 S. W. 275; *Painter v. Painter* (1909) 146 Mo. App. 598, 601-602, 124 S. W. 561; *Todd v. James* (1911) 157 Mo. App. 416, 421, 138 S. W. 929.

41. (1900) 87 Mo. App. 386.

42. The distinction made in the cases cited that the decedent left no debts is, of course, inconsistent with the rule that administration is entirely independent of the existence of debts. It is also inconsistent with the statement repeatedly made in the cases that it is impossible to know whether or not the deceased left debts until administration is duly had. See cases cited under notes 23 and 24 *supra*.

43. On principle, a local debtor should be protected in paying the heirs only when the deceased left no creditors, whether in Missouri or elsewhere. Creditors of the decedent should have the right to secure the appointment of an administrator and through him to collect the assets of the deceased wherever situated, although, of course, such ad-

latter have the beneficial title to the asset, and such title should be recognized in preference to the title of an administrator subsequently appointed. If, however, the non-resident left debts in this state, an administrator representing creditors would have an interest which would prevent the heirs from acquiring title, and payment to the latter would not constitute a discharge of the indebtedness.

The above conclusion, while justified under the authorities cited, probably is not a correct statement of the law in the light of the decision in *Troll v. Third National Bank*⁴⁴ discussed above. In the latter case the court states without qualification that the existence of debts is wholly immaterial in determining the right of the administrator to recover the assets situated in this state. The existence of assets in the state is said to be the sole test. Unless the *Troll* case can be distinguished on the ground that the defendant was attempting to attack collaterally the powers and duties of the administrator (and even on this the *Richardson* case is *contra*, holding that the defendant is merely setting up an equitable defense), the weight of the decision in *Richardson v. Cole* and in similar cases recognizing the title of the heirs without administration is seriously affected.

On principle there seems to be no valid reason for rejecting the ruling in *Bell v. Farmers & Traders Bank*, based as it is upon *Richardson v. Cole*. If the non-resident left creditors in this state, the title of the heirs should not be recognized. Administration should be had and the creditors afforded an opportunity of proving up their claims against the estate. A local debtor of the decedent should ascertain at his peril that there are no local creditors before he pays the heirs of the deceased. If, however, there are no creditors and payment is made to the heirs, the asset has reached the parties ultimately entitled to receive it, and it would be a useless expense to permit a local administrator to take charge of the asset. He would be but a dry trustee for the heirs who have already received payment. To

administrator could not maintain a suit outside the state of his appointment.

44. (1919) 211 S. W. (Mo. Sup.) 545.

permit him to enforce a second payment is both inequitable and unnecessary.

Likewise, on principle, the local debtor should be sustained in paying his debt to the foreign domiciliary executor or administrator. In such case it should not be necessary for the local debtor to determine that the deceased left no creditors in this state. The domiciliary representative has legal title to the asset, and he is legally bound to use any sum collected for the payment of any creditor's demand. It is submitted that payment to such representative should constitute a valid discharge of the debt, and that the contrary rule laid down in *Crohn v. Clay County State Bank* and tacitly approved in *Troll v. Third National Bank* imposes an unnecessary burden upon the local debtor and should be modified in future decisions on this subject.

ROBERT B. FIZZELL.⁴⁵

Kansas City, Missouri.

45. Mr. Fizzell received his collegiate training in University of Illinois and his legal training in the Harvard Law School. At present he is the junior member of the firm of Bowersock & Fizzell, Fidelity Trust Bldg., Kansas City, Missouri.—Ed.

BAR BULLETIN

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OFFICIAL PUBLICATION OF THE MISSOURI BAR ASSOCIATION

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Trial by jury is becoming an increasingly expensive luxury.—AUSTIN W. SCOTT, Harvard Law School, 33 H. L. R. 245.

We have no degrees of negligence in Missouri, so far as the right to recover for negligence is concerned. We are confining our remarks to the case in hand, and to the statute under which it is brought.—GRAVES, J., in *State ex rel v. Ellison*, 213 S. W. 1. c. 461.

But why so cautious?

DILEMMA OF TRIAL COURTS.

An inspection of the reports of the appellate courts of Missouri shows that about fifty-five per cent of the cases are affirmed and about forty-five per cent reversed or reversed and remanded.

A brilliant journalist, in speaking of the members of his profession, said that the editor sat at his window, watched passing events and made

his comments on the spur of the moment, but that his readers had ample time to criticise them at their leisure—"the editor had to shoot on the wing but was shot at 'settin'". This is very much the predicament of the trial courts. They and trial lawyers know from experience how little opportunity the judge has during the hearing to consider the law of the cases he passes upon. Rarely, even in intricate cases, is he presented with a trial brief and few, very few, lawyers on motions for new trial prepare such a brief as they would be willing to present to the appellate court. Nevertheless, after an appeal is taken, with microscopic eye, they leisurely search the hurriedly made record for errors and bombard the appellate court with their heavy legal artillery and succeed in reversing cases on points never presented to the trial court and of which he never heard.

Would not the interest of litigants be better subserved and the whole system of jurisprudence much improved if lawyers and trial judges, after careful preparation, would enter upon hearings with determination to end the controversy? Instead of this some lawyers seek to make the trial court a whistling station on the road to the appellate court. It would at least tend to make better trial judges, help the overworked appellate courts and bring speedier returns to the lawyer, to say nothing of the litigant.—W. O. T.

ERROR IN INSTRUCTIONS.

A very large percentage of cases are reversed and remanded on account of faulty instructions. Some wag very aptly said that a certain divine "offered the most eloquent prayer ever addressed to a Boston audience." It would be an interesting survey to ascertain the actual influence many declarations of law have on the minds of the jury. Is it not possible that many instructions, while read to the jury, are really addressed to the appellate court? Of course instructions to juries are invaluable and a necessary guide to a correct finding of facts and by all means should state the law with accuracy. Yet some appellate courts assume that "all error is prejudicial" and lawyers with a desperate case against them on the merits will insist on a reversal because of minute aberrations in instructions that the most astute jury would never discover in a generation—and sometimes succeed.—W. O. T.

That a father is liable for necessities for the support of a son until he is 21, but of a daughter only until she is 18, when the latter is more helpless and weaker of the two, presents a curious situation and we are fully aware of its apparent absurdity in most instances. But such is the statute, and we are controlled by it.—TRIMBLE, J., in *Winner v. Schucart*, 215 S. W. 905, 1. c. 908.

MOTIONS FOR NEW TRIAL.

It will be interesting in many ways to anticipate the probable ruling of the Supreme Court *en banc* on the necessary contents of a motion for a new trial. The changed personnel in each of the two divisions will almost certainly again bring the consideration of this hotly contested question to the court's attention. Should Judge Williamson follow Judge Faris in Division 2 it will be up to Judge Goode to make the compelling majority. Doubtless much can be said on each side of the controversy. One thing in favor of the majority opinion, as at present expressed, is that of convenience. A young lawyer, with perfect propriety, may extract from the files a motion for a new trial filed and used by his grandfather in 1865 in *Smith v. Jones* and refile it today in *Green v. Brown* with the assurance that it in every respect calls to the trial court's attention the errors committed by him. In addition to its convenience, no doubt its antiquity is another strong point in its favor.—W. O. T.

Now, we would like suggestions as to how to raise the standard. We feel that the public is not fully aware of the needs of high preliminary education. There is too much latitude given; there is too much of the idea that a young man should have a chance to make good. If any of you gentlemen have had any experience on a grievance committee, you will know that in practically every case that comes before you it is the man who has never had a good, broad, general education in the first instance before he studied law, and who looks upon the profession of the law merely as a means for getting money, that comes before you.—J. C. COLLINS, member of Bar Examining Board of Rhode Island, at American Bar Association, Sept., 3, 1919.

SECRETARY OF AMERICAN BAR ASSOCIATION.

George Whitelock, of Baltimore, the efficient Secretary of the American Bar Association, is dead. For more than twenty years he had been secretary. After according all the credit due the great lawyers whose devotion has made that Association one of marked influence and efficiency, it was thru its Secretary that its complex parts articulated and its energies were directed and applied. He was a man of rare executive ability, of most pleasing personality. His long connection with the organization made him familiar with all its details and he was a great treasure of information. Perhaps no lawyer in the United States was better known or more beloved than he. To the American Bar Association his loss will be almost irreparable.

NEED OF PERMANENT SECRETARY.

The death of Mr. Whitelock brings to mind the provisions of the constitution of the Missouri Bar Association which provides that its Secretary shall be appointed by the President of the Association. As a result we have a new Secretary with each new President. This is unfortunate. The Secretary should not be changed unless he is incompetent. Upon him rests the responsibility of keeping the various activities alive. He should have energy, executive ability and devotion for his work. If our present secretary proves efficient we should keep him. We need a secretary who will continually prod the committees to activity, who will remind them of their legislative and other duties, who will keep in touch with every department of the Association work and, with the aid of the President and Executive Committee, arrange for meetings, etc. In short, the secretary is the one to see that everybody charged with a duty does it. He is essentially the dynamo of any organization. We trust our new secretary will prove such a jewel.

COMMITTEE REPORTS.

There will be neither time nor opportunity to propose any legislation for the annual meeting this fall. Hence, it devolves on the present committees to submit all reports which can be considered and which will be passed on to new committees to be put up to the Legislature. The last Legislature, for some unaccountable reason, killed the code bills which were the result of so much intelligent work on the part of former committees and which had the unanimous approval of the Association. This, of course, was very unfortunate, but we must try again. Let's not be weary in well doing for in due season we shall reap if we faint not. We trust the various committees will hold meetings at an early date so that they can complete their reports in time for publication before the annual meeting.

Legislative regulations of the details of legal procedure is bald usurpation of the function of the courts. The courts originally framed the rules of procedure, and this was logical because the courts are held responsible for the results; but it is absolutely illogical and absurd to hold them responsible when the legislature excludes the courts from the regulation of procedure. The legislature may well lay down the framework, but should stop there and commit to the courts the working out of the details of procedure by rules. Elasticity and adaptability may thus be obtained in place of rigidity. To restore the rule-making power to the courts, where it logically belongs, is to strike the fetters from the hands

of the courts. When that is done we shall have made a long step towards the goal of uniform and simplified procedure.—JOHN B. WINSLOW, Chief Justice of Wisconsin, at American Bar Association, Sept. 3, 1919.

CODE OF ETHICS.

Several years ago, I forget how many, I presented to a meeting of the State Bar Association at St. Joseph, a Code of Legal Ethics. It was practically identical with the code adopted by the American Bar Association. It was carefully considered, section by section, and was unanimously adopted.

Accompanying the adoption of this code was a resolution requesting the Supreme Court of Missouri to have this code of ethics printed in the volumes of the official reports. This resolution I presented at Jefferson City, and Judge Gantt, I believe it was, said he would present the matter to the Court. But the code was never published. This should be done.

A young man who has graduated from a college or law school and has gone with a firm as a clerk, usually has professional ideals of the highest type. Suppose while interviewing some witnesses he is asked by the head of the firm to do something which he thinks to be in conflict with his professional ideals. If he could take a volume of the official reports and call attention to a section of the code and ask his employer if his request did not conflict with the code would it not be helpful to both?

Should we not have an officially recognized standard to go by? Are not all morals, especially professional ethics, largely a matter of education? If our State Bar Association has set a standard, should it not be officially printed as a *vade mecum* to the young lawyer struggling with poverty and its resulting temptations to sharp practice?

I respectfully urge this matter as worthy the attention of the State Bar Association in these days of dangerous commercializing tendencies in our profession.

HENRY D. ASHLEY.

Kansas City, Mo.

THE AMERICAN LEGION.

At 11:45, the night of September 11, 1918, a few minutes before the American artillery began the barrage which opened the St. Mihiel drive, a German shell struck one of our radio stations killing two men and wounding four others. As one of the wounded men was being put into an ambulance, he said to his unwounded comrades: "If I don't get back with you fellows, we'll meet in the states and talk things over."

In different ways and under different circumstances, this thought was expressed every day by thousands of the soldiers along the battle fronts. Immediately after the armistice men began to organize. Regimental, brigade and divisional associations were started. Organizations by arms of the service were attempted, and headway was made in several instances. One large society was formed to include all men who had seen overseas' service. The main thought back of nearly all of these organizations was to keep alive the memories, incidents and history of the service.

But, in the minds of many in France and in America, there was the thought and hope that one great organization, embracing every man and every woman who honorably served in the military or naval forces of the United States during the war, should be formed. They had a vision of a strong and powerful organization which not only should preserve the memories of the war, but should also carry into civil life the same high, unselfish, patriotic spirit which dominated the men and women of the service during the war.

The first meeting to discuss the formation of an after-the-war association of the men and women of the service was held in Paris February 15, 1919. At this meeting it was decided to invite to a convention to be held in Paris March 15, 1919, representatives from all of the units in France and with the army of occupation. These delegates were selected in equal numbers from the officers and men of the divisions. On March 15 the delegates assembled and held what has been known as the "Paris Caucus." This caucus formed a temporary organization, adopted the name "The American Legion" and outlined its purposes in a preamble. An executive committee was selected to push organization. A committee was sent from Paris to carry on the work here in America. A ready response was found everywhere.

On May 8, a great national caucus was held in St. Louis and every state and territory was represented. During the caucus the greatest enthusiasm and the highest spirit of real, loyal Americanism prevailed. They saw in the American Legion an opportunity to render efficient, practical, organized service to the country during the trying, uncertain, and disturbing days of reconstruction. In that caucus all ranks and grades of military service were blended into real comradeship. The general and the private soldier worked together and it was by accident that either knew the previous military rank of the other. They were equals.

The preamble of our constitution shows the high objects to which the American Legion has consecrated itself.

"For God and Country, we associate ourselves together for the following purposes: To uphold and defend the Constitution of the United States of America; to maintain law and order; to foster and perpetuate a one hundred per cent

Americanism; to preserve the memories and incidents of our association in the great war; to inculcate a sense of individual obligation to the community, state and nation; to combat the autocracy of both the classes and the masses; to make right the master of might; to promote peace and good will on earth; to safeguard and transmit to posterity the principles of justice, freedom, and democracy; to consecrate and sanctify our comradeship by our devotion to mutual helpfulness."

At the first opportunity the American Legion showed its sincerity and the power of its determined patriotism by specific performance. In the St. Louis caucus, in less than two months after its birth in Paris, the American Legion adopted resolutions demanding an investigation of the action of the War Department in giving honorable discharges to convicted conscientious objectors; vigorously denounced the I. W. W.'s, Anarchists and International Socialists; demanded that Congress deport those aliens who refused to join the colors during the war and pleaded their citizenship in other countries to escape the draft; demanded that "naturalized citizens convicted under the espionage act shall have their citizenship cancelled and shall be deported." It did not stop with the passage of resolutions. It provided a legislative committee to see that the recommendations of the caucus were acted upon. For months that committee has been in Washington making the United States less popular as a health and pleasure resort for the Reds, Anarchists and Bolsheviks of the world.

On the 16th day of September 1919, the American Legion was incorporated under an act of Congress.

In Minneapolis, on the 11th day of November, 1919, the American Legion held its first annual convention. In that convention it continued, enlarged and added to the work outlined and started in May at St. Louis. What had been merely a tentative organization was made permanent. Tho less than eight months had elapsed since the idea of the American Legion was first formally discussed by a few men, more than a million members belonged to the Legion before its first annual convention. It was nearly a year after Lee surrendered at Appomatox before the Grand Army formed its first post. One year from the signing of the armistice the American Legion had established more than five thousand local posts, had perfected departments in every state and territory in the United States, and was doing excellent work in Cuba, Mexico, Panama and Hawaii.

Some have contended that the American Legion was formed in order to keep soldiers together in some form of military organization. Section 1, Article II of our constitution, in part, is as follows: "The American Legion is a civilian organization; membership therein does not affect or increase liability for military or police service." To wipe from the Legion

every semblance of the military, the above section further provides that: "Rank does not exist in the American Legion; no member shall be addressed by his military or naval title in any convention or meeting of the Legion." In a meeting of the American Legion, General Pershing, Admiral Sims, Sergeant Michael McGrath and First Class Private Tony Tontino all stand on equal footing and in the true spirit of the word call each other "Comrade," and by no other title are they addressed while in an American Legion meeting.

Others have expressed the fear that the American Legion has been founded for political purposes. The constitution of the American Legion provides: "The American Legion shall be absolutely non-political and shall not be used for the dissemination of partisan principles nor for the promotion of the candidacy of any person seeking public office or preferment. No candidate for or incumbent of a salaried elective public office shall hold any office in the American Legion or in any department or post thereof." Our motto is "Policies not Politics."

This, however, does not mean that the members of the American Legion will not be active in public affairs. Already it has produced splendid results at Washington. The War Risk Insurance Act has been modified and the handling of policies of insurance simplified so that it is of far greater benefit to the men carrying government insurance. It was largely responsible for the passage of the Sweet Bill which greatly increases the allowance to disabled soldiers. It is encouraging the passage of a bill providing for adequate national defense. It is handling all manner of claims coming from ex-service men. Thousands of them have not obtained their allowances from the government, their back pay, liberty bonds for which they subscribed and paid, and pensions and deposits to which they are entitled. In almost every town there is an American Legion employment bureau for the purpose of securing employment for ex-service men. The American Legion is also cooperating with the War Department in vocational training for wounded men and is assisting the Public Health Service in keeping in touch with those who have not regained their health.

While the American Legion cannot discharge a debt which the public owes to the men who risked so much and gave so much for America, it is doing all it can to put every man into the place for which he is now best fitted, to help the wounded get the proper medical care, and to drive the "unrest of the times" from the hearts of the discouraged, unfortunate and unhappy ex-service men. It is trying to show these men that the heart of America is not cold and that its appreciation is not dead. Public sentiment must sustain us in this work.

In the United States there are four million eight hundred thousand men and women eligible for membership in the American Legion. Nearly

half have joined already. We are not yet a year old. We want to increase our membership as rapidly as possible. If you believe in our purpose, please help us. In Missouri there are thirty thousand members, and two hundred and forty local posts. Missouri furnished over one hundred and fifty thousand soldiers, sailors and marines during this war. They should all be in the Legion. I will especially prize the sympathetic support of our profession in this noble work.

RUBY D. GARRETT.

Kansas City, Mo.

THE MAD STONE CASE.

I first hung out my shingle in the old Underwriters' Exchange Annex and slept in a folding bed in my private consultation room. One day while I was pondering the books and listening for the footsteps of a prospective client, a little blear-eyed Irishman opened the door, looked me over, and with a rather disappointed expression in his face critically remarked: "Is this Lawyer Ashley?"

His prefix revived me, and I replied: "It certainly is."

"Well, Mr. Frank Sellers of Benjamin McLean & Co. has sent me to you and will pay any bill I have from you for my law suit."

"All right," said I, electrified into animation. "What is your trouble?"

"Well, two weeks ago last Tuesday, I was bit by a large black Newfoundland dog, and the mad stone adhered to my leg two hours. I then writ the owner of this dog a letter and, Heaven be praised, I have a copy."

He thereupon drew from his pocket a crumpled dirty bit of paper and proceeded to read in a delicious Irish brogue and *cum expressione*:

"Dear Sir: Having been bit by your large black Newfoundland dog, and the Mad Stone adhered to my leg two hours, I write to inform you that upon the first germs of hydrophobia appearing in my system, I will kill you and the dog; if, however, the dog is kilt by you, we will be friends as before."

"Now, lawyer, after he got this letter, he took agin me a writ, habbus corpeous or keep the peace or some damn thing or other, claiming the letter contained a threat agin him. Now I can't see how the letter contained any threat, for I told him if the dog was kilt by him we would be friends as before. Now, lawyer, I want to have the law on him. But wait a minute, lawyer, I'll show the bite."

"Oh, never mind," said I.

He fixed his bleared eyes on me, put his foot on a chair beside me and, as he rolled up his trousers and unrolled a red flannel rag around the

injured leg, said in a determined manner: "I *will* show you the bite." The leg was indeed a terrible sight, swollen and blue as indigo.

Thereupon I examined the city ordinances about harboring a vicious dog and advised him that it was the alphabet of dog law that every dog was entitled to his first bite.

"What do you mean by that, lawyer?"

"I mean that you must show the previous vicious disposition of this large black Newfoundland dog before we can convict the owner under the ordinance against harboring a vicious dog—show that the dog had attacked or bitten some one before he bit you."

"All right, lawyer," said he, and departed.

The next day he returned and said, "Lawyer, I think I have the evidence."

"All right," said I, "What is it?"

"Well I have the name of a reputable citizen of the West Bottoms who will go upon the stand and swear in the book that not longer than one week before this terrible dog bit my leg, he completely tore from the person of my friend of the West Bottoms a fine pair of bran-new seven-dollar pants."

Thus armed, we filed our complaint in the police court and convicted the owner of harboring a vicious dog. He was fined \$5.00, and an order was made that the dog be officially executed.

I got the clerk, who was a wag, to put the death warrant in a large envelope with skull and crossbones for embellishment. Accompanied by a big Irish policeman, in full regalia, my client proceeded in triumph to the offending neighbor's yard, and there, before his eyes, the offending dog was officially executed.

Returning to my office, after liberal libations, he said: "And now Lawyer Ashley, what is your bill?"

Being ingenuous and new in the art of estimating from the client's point of view, I modestly stated my fee to be ten dollars.

Pulling out two five-dollar bills from a well lined wallet, he leaned over my chair, and remarked with alcoholic breath: "Lawyer, it was damn cheap for the money."

HENRY D. ASHLEY.

Kansas City, Mo.

ST. LOUIS NOTES

Recently the activities of the membership committee of the Bar Association of St. Louis have resulted in bringing into the membership of the Association the large majority of the members of the St. Louis Bar. This membership now approximates 850.

Beginning last fall the Bar Association of St. Louis, at its monthly

meetings, has had as its guests members of the local, State and Federal Bench. Through these meetings the lawyers of St. Louis have had an opportunity to meet and to become better acquainted with the judiciary. It is needless to say that this better acquaintance has been mutually delightful and helpful.

At the December meeting, Judges Hook, Munger and Stone were guests of the Association. Messrs. Barclay and Krum were the speakers of the evening.

At the previous meeting, the association gave to Hon. Chas. B. Faris, the in-coming, and to Hon. David P. Dyer, the senior judge of the U. S. District Court, a reception which was largely attended. Judge Geo. W. English, the recently appointed Judge of the U. S. District Court of Illinois, Southern Division, was present and delivered an address. Both of the foregoing meetings will be long remembered as among the most delightful occasions in the history of the Association.

American Bar Association Meeting.

Most important and of especial interest to the lawyers of Missouri and indeed of all of our neighboring states is the fact that the American Bar Association will hold its annual meeting in St. Louis August 25th, 26th, and 27th, 1920. There will probably be an attendance of between two and three thousand lawyers, since the membership is 10,000. This will be the second time that the American Bar Association has met in St. Louis, the first meeting occurring during the World's Fair. The Secretary and the Treasurer of the Association will be in St. Louis February 21st to select headquarters and begin the arrangements for the annual meeting. All Missouri lawyers, especially should keep this in mind and make the necessary plans to attend the sessions of the Association.

W. SCOTT HANCOCK.

KANSAS CITY NOTES

The Kansas City Bar Association held its first meeting of the year on January 17th. President German announced his committees for the year and laid special stress on the Legislative Committee, urging its members to begin their work at once, so as to permit the Association to pass on any proposed bills which they may recommend before the opening of the Legislature.

The Association authorized the creation of a memorial tablet and drinking fountain containing the names of the members of the Jackson County Bar who gave their lives in the great war. In addition to the names, the tablet will bear a suitable inscription and will be placed in

the County Court House in Kansas City. This tablet is entirely separate and distinct from the great two million dollar memorial for which the money has been raised by Kansas City.

The speaker of the evening at the Bar Association meeting was Governor Charles B. Brough of Arkansas. He delivered a most scholarly and eloquent address.

It is anticipated that the census will put Kansas City in the three hundred thousand population class, in which event sundry statutes heretofore applying only to St. Louis will automatically become operative in Kansas City. Mr. German called attention to this fact and named a committee to make compilation of such statutes.

The last Legislature created a Board of Paroles, composed of the ten circuit judges and the judge of the Criminal Court, which passes upon the granting and revoking of all paroles, the work formerly done by the judge of the criminal court who heard the case. In addition to these duties the Board has complete control of the McCune Home for Boys, the Parental Home for Girls and the Detention Home, comprising all the juvenile institutions of the county.

Mr. W. H. H. Piatt, of Kansas City, has been selected by the Executive Committee of the American Bar Association as a member of a special committee to consider a change in the policy, plan and scope of the American Bar Association Journal and to report to the spring meeting of the Executive Committee to be held in Chicago, April 8th, 1920.

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LAW SERIES

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MARCH, NINETEEN HUNDRED AND TWENTY

NOTES ON RECENT MISSOURI CASES

CONTRIBUTORY NEGLIGENCE—ASSUMING RISK TO SAVE EMPLOYER'S PROPERTY. *Hill v. East Saint Louis Cotton Oil Co.*¹ In this case the Court of Appeals has again laid down the rule, several times expressed in Missouri, that if one puts himself into a position of danger in order to save property, which has been endangered by the negligence of defendant, and is injured in such attempt he is guilty of contributory negligence, and cannot recover.

Plaintiff was a workman employed in a cotton gin of defendant. The defendant negligently caused wet cotton to be run thru the machinery, and this fact, combined with defendant's negligent use of a worn and defective brush wheel (a part of the gin machinery), caused the wet cotton to catch fire from friction and to endanger the entire property. The plaintiff, in order to save his master's property, thrust his gloved hand into a narrow space in close proximity to certain knives to draw out the burning cotton before it set fire to the property. In so doing plaintiff's hand was caught in the knives and he was injured. Witnesses testified that the act of plaintiff in placing his hand where he did was

1. (1919) 214 S. W. 419.

dangerous and likely to cause him an injury. Plaintiff had judgment in the trial court. The Springfield Court of Appeals reversed the judgment, Bradley, J., dissenting. On rehearing the case was remanded.

The decision seems to be well supported by the Missouri cases. A line of decisions beginning with a *dictum* in the famous Eckert case in New York has laid down the proposition that one may not put himself into peril in order to save property merely. If he does so he precludes his recovery for an injury so received notwithstanding the fact that the property was so endangered by the original negligence of the defendant.² The rule is applied not only as against a volunteer,³ but also against the owner of the property endangered,⁴ or his servant.⁵

The case well illustrates the fact that a question which was originally, and as a matter of common sense is, one of fact, to be settled in each instance by a jury, tends to become a question of law for the court.⁶ On first impression the question whether any given set of facts constitutes negligence ought to be decided by the jury. It will be readily granted that no act can be deemed negligent apart from the surrounding circumstances. Whether or not a man acts negligently in certain premises depends on the question, "What would the ordinary, reasonable individual

2. *Eckert v. Long Island Railroad Company* (1871) 43 N. Y. 502. The rule which has been followed by the Missouri courts was here stated in the following form: "A person voluntarily placing himself, for the protection of property, merely, in a position of danger, is negligent, so as to preclude his recovery for any injury so received." This statement was *obiter dictum* since the court allowed recovery on the theory that the plaintiff was endeavoring to save human life. This *dictum* has been followed in *Donohoe v. Railroad* (1884) 83 Mo. 560; *McManamee v. Railroad* (1896) 135 Mo. 440, 37 S. W. 119; *Slinhard v. Lamb Construction Company* (1919) 212 S. W. 61; and the principal case. In the *McManamee* case the court approved the following instruction: "Even tho the jury believe that the deceased's horse and wagon was exposed to a collision with defendant's train, this would not excuse or justify him precipitating himself in front of the train, and if you find that he did so in order to save his said horse and buggy, then your verdict must be for the defendant." Thus the jury was not per-

mitted to pass on the question whether the plaintiff's act was one which a reasonable man would suppose to be dangerous, or whether it was in fact negligent under the circumstances.

3. *Eversole v. Railroad* (1913) 249 Mo. 523, 155 S. W. 419.

4. *McManamee v. Railroad* (1896) 135 Mo. 440, 37 S. W. 119.

5. The principal case. The court admits that "some weight" may be given to the fact that the plaintiff was attempting to rescue the property of his master, but in refusing to allow the jury to consider any question other than whether the plaintiff put himself into a dangerous place it is not seen how this modification of the rule can be of any benefit to the plaintiff.

6. This tendency is well pointed out by Prof. Terry in his *Principles of Anglo-American Law*, sections 75 and 195. He says that there can be no such thing as "negligence *per se*" or "reasonableness *per se*." The party is called on to act or to make a choice and in so doing he must take into account the circumstances which make up his situation.

have done in those same premises?" When the question has been repeatedly put to a jury on any set of circumstances and the jury has uniformly found that those circumstances do or do not constitute negligence, then it is conceivable that a rule of law has been established, i. e., that when similar circumstances arise the court may take judicial notice of such uniform finding of juries. This process probably accounts for the establishment of the stop, look, and listen rule⁷ which has gained rather wide acceptance. Likewise it is generally held that the act of pointing a loaded gun at a person is negligent,⁸ or even standing on a platform of a moving train.⁹ In jurisdictions adopting the above rules the question of negligence is not submitted to the jury at all. If the evidence shows clearly that the facts exist, then there is no question for the jury. Such circumstances constitute negligence.

A great many courts and writers have pointed out peril in such a process of reasoning, however. In the first place circumstances are never alike. The standard man test applied to questions of negligence always takes into account as one of the surrounding circumstances the peculiar knowledge or lack of knowledge of the particular man in question. The form of the question is not simply, "What would the ordinary, prudent man have done?" but, "What would the ordinary, prudent man have done situated as this man was and having the knowledge that he had?" Now it is conceivable, for instance, that a particular man may never have heard of a railroad or a fire-arm. In such a case he might reasonably be supposed to cross a railroad track without stopping, looking or listening or he might handle a gun in such a manner as to endanger bystanders. To make these acts negligence is to require all persons to act at their peril irrespective of whether they are in fact negligent. This is a possible solution, and may even be good public policy, but if that is to be the basis of the rule it should be so stated and it should not be confounded with any question of negligence. It is difficult at best to make the ordinary jury understand what they are to decide when negligence is in issue. When to this question we add a requirement that the jury shall distinguish simple negligence, gross negligence and recklessness, as is done in many jurisdictions, it is highly probable that we have made the task utterly impossible. Nor do we avoid the difficulty by taking the question from the jury, that is, by telling them that if they find certain facts then they must find negligence, when, as a matter of fact, such a finding conflicts with common sense. There is no surer way of bringing the law and the courts into disrepute.

7. This rule was approved incidentally in the case of *McManamee v. Railroad*, *supra*.

8. Cases collected in Terry, *Princi-*

ples of Anglo-American Law, section 200.

9. (1864) 8 Allen (Mass.) 234.

Even at this late date it is submitted that the doctrine laid down in the principal case is contrary to the weight of authority in America,¹⁰ and that it runs directly counter to reason and justice and complicates an already difficult and confused question. With all respect for the learning of the many courts in accord with the principal case the doctrine there laid down rests on a fundamental misconception of the nature of negligence. It is not true that "voluntarily placing one's self in a position of danger" is negligence. The cases all admit this by recognizing that one may assume great peril and still not be "deemed negligent" where the purpose is to save life.¹¹ Obviously, a reasonably prudent man will assume greater risk in order to save human life than to save property. In other words a given act is not negligent where life is in danger, and yet the identical act might be grossly negligent if property only be at stake. The ordinary jury can understand that. But what can a jury be expected to derive from such an instruction as the following: "A man may be negligent in order to save life, so long as he is not reckless, and still not defeat his right to recover for defendant's negligence. But he may not place himself in any position of risk or danger in order to save property. If he does run any risk for such a purpose he is deemed to be contributorily negligent and his recovery is precluded?" The cautious man will run no risk when it is unnecessary to do so. Certain risks must constantly be taken, however, in the ordinary conduct of life. A servant who would refuse to run any, even the slightest, risk in order to save his master's property from inevitable loss would certainly not be doing his duty. If the risk were very slight and the danger to the property very great it seems he might even be discharged for neglect of duty. If this is true is it not a monstrous proposition to refuse him any remedy in an action for injury, caused by his master's negligence, for the reason that he placed himself in some danger, when it was his clear duty to assume such danger?

The Court of Appeals justifies the rule which it lays down by saying: "The most potent fact in favor of this rule is that the servant has no right to endanger the master in a far greater risk than that which he sought to avert."¹² True, he has no right to do so negligently, but must he refrain at his peril from so doing and ought he not to be allowed to go to the jury on the question of whether under the circumstances he was negligent in so endangering his master?

Further, after holding the law to be as stated in the decision in the principal case, it is not seen what possible good will come to the litigants

10. Shearman and Redfield, Negligence, Section 85d; 20 Ruling Case Law, section 110, page 133. The cases are there collected and the statement

made that the great weight of authority is against the *dictum* in the Eckert Case.

11. Note 10.

12. The Principal case, page 422.

from further proceedings. In remanding the case the court limits the finding of the jury to the question of whether there was "inherent and necessary danger attending plaintiff's action." Suppose the jury finds that the plaintiff took a risk, even the slightest risk, in a dangerous emergency, the plaintiff will be thereby precluded from recovery, even tho the jury might have found, had the question been submitted, that he did nothing that a prudent and cautious employe would not have done under similar circumstances.¹³

JESSE E. MARSHALL.¹⁴

But it is submitted that the decision in the principal case can be justified on the theory that the conduct of the plaintiff was so clearly negligent that reasonable minds could not differ about it and that, therefore, there was no question for the jury.

K. C. S.

SURVIVOR OF CAUSE—DEATH OF DEFENDANT. *Ryan et al v. Ortgier*.^{1—} It was held in the principal case that a cause of action for death from injury caused by the defendant's negligence did not, under Rev. St. 1909, sections 105, 106, 5426, and 5438, survive the death of the defendant.

At common law a cause of action for a purely personal tort was extinguished upon the death of either party to the action.² Applying the maxim *actio personalis moritur cum persona*,³ causes of action for

13. The Missouri court has already held that where a servant is required to act in an emergency he need not exercise "the perfection of judgment" and his recovery for an injury to himself is not precluded by the fact that he might have acted in such a way as to have avoided the injury. In the case of *Dean v. Railroad* (1911) 156 Mo. App. 634, 137 S. W. 603, the plaintiff, in endeavoring to stop a freight car which had broken loose and was running down hill ran under a gang plank which fell on him and injured him. The evidence showed that he might safely have stopped the car by going around to the other side with no risk to himself. The court allowed plaintiff to recover, saying that it was his duty to act to save his employer's property, and that in so doing he was "not required to exercise the perfection of judgment."

14. Assistant Professor of Law, School of Law, fall term, 1919.

1. (1919) 208 S. W. 856.

2. *Hambly v. Troit* (1776) 1 Cowp. 371; *Baker v. Bolton* (1808) 1 Camp. 493; *Higgins v. Breen* (1845) 9 Mo. 497, 498; *Kingsbury v. Lane* (1853) 21 Mo. 115; *Stanley v. Vogel* (1880) 9 Mo. App. 98, 99; *Baker v. Crandall* (1883) 78 Mo. 584, 587; *Stoeckman v. Terre Haute, etc. Ry. Co.* (1884) 15 Mo. App. 503, 507; *Davis v. Morgan* (1888) 97 Mo. 79, 80; *Bates v. Sylvester* (1907) 205 Mo. 493, 496, 104 S. W. 73, 11 L. R. A. (N. S.) 1157; *Gantt v. Brown* (1912) 244 Mo. 271, 302, 149 S. W. 644.

3. It has been suggested that the word "*Personalis*" is a misreading for "*poenalis*." See Pollock, *Torts*, 9th ed. p. 64, note (g).

4. 1 Woerner, *American Law of Administration*, 2 ed. sec. 290. For the origin and history of this rule see Goudy, *Two Ancient Brocards*, in *Oxford Legal Essays*, p. 216.

death did not survive the death of the person injured or that of the tortfeasor.⁵ The reason for this rule may be found in the vindictive and quasi-criminal⁶ character of suits for personal injuries in early law, but once the notion of punishment⁷ and vengeance⁸ is abandoned and that of compensation substituted as the principal element in the measure of damages in torts, this rule seems wholly inapplicable to modern conditions. Nor is there any reason why the heirs and legatees of a deceased tortfeasor should not take the estate subject to actions *ex delicto* as well as actions *ex contractu*. That this view has obtained to some degree is shown by the inroads made upon the principle both at common law⁹ and by statute.¹⁰ While the strict rule of the maxim has been modified without the aid of a statute with respect to certain tort actions, it has required a statute to prevent the abatement of an action for personal injuries which result in death.

The most important modification of the law in England in this respect is known as Lord Campbell's Act,¹¹ giving an action to the ex-

5. *McNamara v. Slavens* (1882) 76 Mo. 329, 330; *Gibbs v. Hannibal, etc.* (1884) 82 Mo. 143; *Vawter v. Mo. Pac. Ry. Co.* (1884) 84 Mo. 683; *Hegerick v. Keddle* (1885) 99 N. Y. 258, 1 N. E. 787; *Davis v. Nichols* (1891) 54 Ark. 358, 15 S. W. 880; *Bates v. Sylvester* (1907) 205 Mo. 493, 104 S. W. 73, 11 L. R. A. (N. S.) 1157.

6. Lord Mansfield said: "All private criminal injuries or wrongs as well as all public crimes, are buried with the offender." *Hambly v. Trott* (1776) 1 Cowp. 371, 373. The court said in *Mitchell v. Hotchkiss* (1880) 48 Conn. 16; "But all private as well as public wrongs and crimes are buried with the offender. The executor does not represent or stand in the place of the testator as to those, or as to any acts of misfeasance or malfeasance as to the person or property of another"

7. In *Weiss v. Hunsicker*, 3 Penn. Dist. R. 445, 14 Pa. Co. Ct. Rep. 398, it was said: "The right of action is regarded in the nature of a punishment of the wrong-doer, and, the moment death supervenes, the action, altho commenced before, abates."

8. "A process which is still felt to be a substitute for private war may seem incapable of being continued on behalf of or against a dead man's estate, an

impersonal abstraction", Pollock, *Torts*, 9th ed. p. 64. For a criticism of the common law theory see 17 C. J. note 4, p. 1183.

9. It was early established that an executor could be made to answer for some actions not founded on contract where the estate in his hands was benefited by the tort. See historical note on the classification of the Forms of Personal Actions, F. W. Maitland, in Pollock, *Torts*, 9th ed. Appendix A. p. 577, 582. See also, *Hambly v. Trott* (1776) 1 Cowp. 375; *Higgins v. Breen* (1845) 9 Mo. 497, 498. The action was permitted on the doctrine of quasi contracts and the tort action was transmitted into a contract action which would survive as against the executor.

Originally there was no survival of action for the breach of a simple contract, the notion being that such breach was a tort. It was not until 1611 that it was definitely held that assumption would lie against an executor. See *Pinchon's Case* (1511) 9 Co. Rep. 86b; *Wheatley v. Lane* (1668) 1 Wm. Saunders 216 a.

10. Rev. St. 1909 secs. 105, 106, 5426, 5438.

11. 9 and 10 Vict. c. 93, amended by 27 and 28 Vict. c. 95.

ecutor and administrator for the death of one killed thru the wrongful act, negligence, or default of another, provided such person could have maintained an action had he lived. Similar statutes have been adopted in most of the states in this country,¹³ and the subject is covered in Missouri by section 5426.¹³ It is held that this provision does not extend to the representative of the wrong doer.¹⁴ Also section 105,¹⁵ providing for the survivor, by and against personal representatives, of actions for wrongs done to "property, rights or interests" does not apply to a cause of action for personal injury.¹⁶ Section 5438,¹⁷ which gives a right of action for personal injuries "not resulting in death" against the personal representative of a tort-feasor, did not change the common law as to actions for personal injuries resulting in death.¹⁸ Under the con-

12. See table of statutes, Tiffany, *Death by Wrongful Act*. 2 ed. p. XX.

13. Rev. St. 1909. "Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured." (Sec. 5426.)

14. *Hegerich v. Keddie* (1885) 99 N. Y. 258, 1 N. E. 787; *Hamilton v. Jones* (1890) 125 Ind. 176, 25 N. E. 192; *Davis v. Nichols* (1891) 54 Ark. 358, 15 S. W. 880; *Bates v. Sylvester* (1907) 205 Mo. 493, 104 S. W. 73, 11 L. R. A. (N. S.) 1157; *Gilkinson v. Mo. Pac. Ry. Co.* (1909) 222 Mo. 173, 121 S. W. 138, 24 L. R. A. (N. S.) 844.

15. Rev. St. 1909. "For all wrongs done to property, rights, or interests of another, for which an action might be maintained against the wrong doer such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrong doer, and, after his death, against his executor or administrator, in the same manner and with like effect, in all respects, as an action founded on contract." (Sec. 105.)

16. *Stanley v. Vogel* (1880) 9 Mo.

App. 98; *Gibbs v. Hannibal etc.* (1884) 82 Mo. 143; *Hegerich v. Keddie* (1885) 99 N. Y. 258, 1 N. E. 787; *Bates v. Sylvester* (1907) 205 Mo. 493, 104 S. W. 73, 11 L. R. A. (N. S.) 1157; *Gilkinson v. Mo. Pac. Ry. Co.* (1909) 222 Mo. 173, 121 S. W. 138, 24 L. R. A. (N. S.) 844; *Shawson v. Metropolitan Ry. Co.* (1912) 164 Mo. App. 41, 46, 148 S. W. 135; *Greer v. St. Louis I. M. and So. Ry. Co.* (1913) 173 Mo. App. 276, 284, 158 S. W. 740.

17. Rev. St. 1909. "Causes of action upon which suit has been or may hereafter be brought by the injured party for personal injuries, other than those resulting in death whether such injuries be to the health or to the person of the injured party, shall not abate by reason of his death, nor by reason of the death of the person against whom such cause of action shall have accrued; but in case of the death of either or both such parties, such cause of action shall survive to the personal representative of such injured party, and against the person, receiver or corporation liable for such injuries and his legal representative, and the liability and the measure of damages shall be the same as if such death or deaths had not occurred." (Sec. 5438.)

18. *Bates v. Sylvester* (1907) 205 Mo. 493; 104 S. W. 73, 11 L. R. A. (N. S.) 1157; *Gilkinson v. Mo. Pac. Ry. Co.* (1909) 222 Mo. 173, 121 S. W. 138, 24 L. R. A. (N. S.) 844; *Shawson v. Met. St. Ry. Co.* (1912) 164 Mo. App. 41, 47, 148 S. W. 135; *Greer v. St. Louis I. M.*

structions which have been placed upon sections 105, 106, 5426, and 5438, of our statutes, the principal case is in accord with the clear weight of authority in Missouri and other states.

The result is that the common law rule that actions for personal injuries resulting in death abate with the death of the wrong doer still obtains in Missouri. Following this rule, if the party injured dies from a cause other than the injury caused by the willful act or negligence of the tort-feasor, and the suit has been instituted because of the tort before the death by independent cause, the action survives to his representative under section 5438 as against the estate of the deceased wrong doer; but if death results from the injury caused by such wrong doer, the action abates upon the wrong doer's death. Since compensation to the widow, children, parents, next of kin, etc., rather than punishment of the wrong doer is the fundamental reason for permitting an action for death, it is submitted that the action for injury resulting in death should survive against the estate of the tort feasor. However, the remedy for what has been termed a "barbarous rule"¹⁰ does not lie with the courts, but is necessarily left with the legislature.

J. C. B.

This note leaves open the question as to whether a cause of action will survive under section 5438 in the event that the person injured dies from an *independent cause* before it has been possible for him to institute a suit.

K. C. S.

INSURANCE—MURDER OF INSURED BY THE BENEFICIARY. *Markland v. Modern Woodmen of America*.¹—The beneficiary of a life insurance contract who murders the insured thereby forfeits his interest in the insurance.² It would be against public policy to permit him to profit by his own crime. The interest of the beneficiary is essentially equitable in nature, and his unclean hands would bar him from recovery;³ while the rights of an heir are strictly legal, and equitable principles would not intervene to prevent him from taking from an ancestor whom he had murdered.⁴

The insurer by the prevailing authority is required to pay the amount

& So. Ry. Co. (1913) 173 Mo. App. 276, 1 c. 284, 158 S. W. 740.

19. Pollock, Torts, 2nd ed. p. 64.

1. (1919) 210 S. W. 921.

2. *Filmore v. Metropolitan Life Ins. Co.* (1910) 82 Oh. St. 208, 92 N. E. 26; *Murchison v. Murchison* (1918) 203 S. W. (Tex.) 423. A beneficiary who had caused death of insured through negligence and had been convicted of manslaughter was permitted to recover insurance in absence of a showing that the

killing was intentional as well as felonious in *Schreiner v. High Court I. C. O. F.* (1889) 35 Ill. App. 576.

3. See note: Murder of the Insured by the Beneficiary, 24 H. L. R. 227.

4. *Shellenberger v. Ransom* (1891) 31 Neb. 61, 47 N. W. 700, 25 L. R. A. 564 and note. *Contra: Riggs v. Palmer* (1889) 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340 and note; *Perry v. Strawberrybridge* (1908) 209 Mo. 621, 108 S. W. 621.

forfeited by the beneficiary to the estate of the insured.⁵ The theory of recovery is not settled. The beneficiary alone is entitled to sue on the contract.⁶ The theory adopted in *Cleaver v. Association*,⁷ an English case, was that upon the forfeiture by the beneficiary a trust resulted to the estate of the insured. An early Iowa case, *Schmidt v. Northern Life Association*,⁸ was decided on the same reasoning. This view has been criticised in that no specific fund is set aside as a trust *res*. Another theory suggested that the obligation of the insurer is quasi contractual for unjust enrichment.⁹ The case is analogous to that where the designated beneficiary is of an ineligible class or later becomes ineligible.¹⁰

Confusion arises when the murdered is both beneficiary of the insurance and heir of the insured. In *Murchison v. Murchison*¹¹ the anomalous result is reached that the murderer could take the insurance as sole heir of the insured but could not recover as beneficiary. The court in *McDonald v. Mutual Life Ins. Co.*¹² refused recovery to the estate of the insured because the offending beneficiaries were also the heirs, but intimated that there might be a recovery of sufficient assets to satisfy creditors of the insured. The difficulty was obviated in *Sharpless v. Grand Lodge A. O. U. W.*¹³ by permitting the next of kin of the insured after the beneficiary to take the insurance as if the beneficiary had predeceased the insured.

The heirs of the insured are not barred from taking because they happen to be the heirs of the offending beneficiary.¹⁴ This situation frequently presents itself where children take from an insured parent who has been slain by the beneficiary parent. There is *dictum* in *Greer v. Supreme Tribe of Ben Hur*¹⁵ to the effect that to permit the children to take in such a case would be a temptation to the father to kill his wife to secure to their children the benefit of her insurance. This argument

5. *Cleaver v. Mutual Reserve Fund Life Association* (1892) 1 Q. B. 147; *Schmidt v. Northern Life Association* (1900) 112 Ia. 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323; *Anderson v. Life Ins. Co. of Va.* (1910) 152 N. C. 1, 67 S. E. 53; *Knights of Honor v. Menkhousen* (1904) 209 Ill. 277, 70 N. E. 567, 65 L. R. A. 508, 101 Am. St. Rep. 239; *Equitable Life Assurance Soc. v. Weightman* (1916) 160 Pac. (Okla.) 629; *Sharpless v. Grand Lodge A. O. U. W.* (1916) 159 N. W. (Minn.) 1068; *Murchison v. Murchison*, *supra*. *Contra: Mutual Life Ins. Co. v. Armstrong* (1886) 117 U. S. 591, 6 Sup. Ct. Rep. 877.

6. *Mutual Life Ins. Co. v. Armstrong*, *supra*.

strong, supra.

7. (1892) 1 Q. B. 147.

8. (1900) 112 Ia. 41, 83 N. W. 800.

9. *Murder of the Insured by the Beneficiary*, 14 H. L. R. 375.

10. *Order of Railway Conductors v. Koster* (1893) 55 Mo. App. 186; *Shea v. Benefit Association* (1893) 160 Mass. 289; *Knights of Honor v. Menkhousen* (1904) 209 Ill. 277, 283; 14 H. L. R. 376.

11. (1918) 203 S. W. (Tex.) 423.

12. (1916) 160 N. W. (Iowa) 289.

13. (1916) 159 N. W. (Minn.) 1068.

14. *Knights of Honor v. Menkhousen*, *supra*.

15. (1917) 195 Mo. App. 336, 190 S. W. 72, 74.

is soundly criticised in *Knights of Honor v. Menkhause*,¹⁶ and it is not believed that a Missouri court would give serious consideration to such reasoning.

In *Markland v. Modern Woodmen of America* the wife who was the beneficiary of her husband's insurance died by her own hand a few hours before her husband whom she had murdered. Their children claimed the insurance as heirs of the insured under a provision in the certificate which designated the heirs of the insured as beneficiaries in event the beneficiary named therein did not survive the insured. The plaintiffs contended that the provision in the contract that the certificate and all payments made thereon should be forfeited to the defendants if the beneficiary should cause the death of the insured did not apply since the wife dying before her husband never became the beneficiary, but the court held that the person named as beneficiary therein was contemplated and death by her hand was an excepted risk. *Greer v. Supreme Tribe of Ben Hur*, *supra*, which was decided upon a similar contract provision, was cited with approval.

The result in these two cases and in the similar case, *Griffith v. Mutual Protective League*,¹⁷ was properly reached upon the peculiar provisions of the contract of insurance, but the *dictum*, which appears in the Greer case to the effect that recovery should not be had even in the absence of such stipulations, is unfortunate. *Anderson v. Life Ins. Co. of Va.*,¹⁸ a case exactly in point with the principal case except for the unfavorable contract provisions, correctly held, it seems, that the heirs of the insured were entitled to the insurance. While in the principal case the action was brought on the contract of insurance by the heirs of the insured as beneficiaries, in the Anderson case the action was apparently brought on a quasi-contractual obligation against the administrator of the beneficiary and insurer.

It would seem that, in the absence of stipulations in the policy or benefit certificate to the contrary, when the beneficiary forfeits his interest by murdering the insured, the estate of the insured should be allowed to recover upon a quasi-contractual obligation for unjust enrichment. The disposition thereof would be controlled by the laws of inheritance. It is for the legislature to determine the rights of an heir to the property of an ancestor whom he has murdered.

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16. (1904) 209 Ill. 277, loc. cit. 280. The court there said: "Human experience teaches that those willing to commit murder and assume the risk of punishment for the benefit of others are so few in number that consideration thereof be-

comes well nigh inconsequential."

17. (1918) 200 Mo. App. 87, 205 S. W. 286. See also, *Grand Circle Women of Woodcraft v. Rausch* (1913) 24 Col. App. 304, 134 Pac. 141.

18. (1910) 152 N. C. 1, 67 S. E. 53.

WITNESS—IMPEACHMENT—SUPPORT BY CHARACTER WITNESSES. *Orvis v. Chicago, Rock Island and Pacific R. R. Co.*¹—As a witness in his own behalf the plaintiff was impeached by proof of prior inconsistent statements in a deposition and in a signed statement to the company doctor. He was further subjected to a rigid and searching cross examination tending to reflect on his veracity. The Supreme Court held that it was not error to reject testimony as to his reputation for truth and veracity offered to rehabilitate him. The rule of the Missouri Courts of Appeals² admitting such testimony was expressly overruled, the court saying that the alleged impeaching matter in these instances went to the credit to be given his testimony rather than to his character and that the value of the testimony as to character would not outweigh the confusion of issues.

*Miller v. St. Louis R. R. Co.*³ seems the first of the overruled Courts of Appeals' decisions to say that after proof of prior inconsistent statements or after a cross examination tending to impugn veracity evidence of character for truth and veracity could be introduced to support the witness. This decision followed the Vermont Case, *Paine v. Tilden*,⁴ based in turn, upon the rule of Phillips and of Greenleaf who rely on the Nisi Prius case of *Rex v. Clarke*.⁵ There the complainant in a rape case, on cross examination, admitted that she had been twice sentenced to the house of correction for theft. But she was allowed to state that she had later been an inmate of the home for the destitute and upon discharge had received an award for good conduct. Holroyd, J., held it proper to permit the superintendent of the latter institution to testify to her good character while there. Courts⁶ denying the rule admitting the testimony have criticised Phillips and Greenleaf as not being supported by *Rex v. Clarke*. This criticism seems well taken. The prosecutrix was impeached by her own admissions and the only effect the evidence of the superintendent could have had was to show a subsequent reform. This is entirely different from the present question.⁷

Six prior decisions of the Supreme Court are cited in support of the rule excluding the evidence. Five of these⁸ hold that evidence of the

1. (1919) 214 S. W. 124.

2. *Miller v. R. R. Co.* (1878) 5 Mo. App. 1. c. 481; *Walker v. Ins. Co.* (1895) 62 Mo. App. 1. c. 220; *Berryman v. Cox* (1897) 73 Mo. App. 1. c. 74; *Browning v. R. R.* (1906) 118 Mo. App. 1. c. 451, 94 S. W. 315; *Brandom v. R. R.* (1908) 134 Mo. App. 1. c. 89, 114 S. W. 543; *Gowley v. Callahan* (1915) 190 Mo. App. 1. c. 666, 176 S. W. 239; *Ross v. Pants Co.* (1913) 170 Mo. App. 291, 156 S. W. 92.

3. (1878) 5 Mo. App. 1. c. 481.

4. (1848) 20 Vt. 554.

5. (1817) 2 Starkie's Cases 241.

6. *Stamper v. Griffin* (1853) 12 Ga. 450; *Brown v. Mooers* (1856) 6 Gray (Mass.) 1. c. 453.

7. 2 Wigmore's Evid. sec. 1117.

8. *Gutswiller v. Lackman* (1856) 23 Mo. 1. c. 172; *Rogers & Gilks v. Troost's Admin.* (1873) 51 Mo. 1. c. 476; *Dudley v. McClurver* (1877) 65 Mo. 241; *Vawter v. Hulst* (1892) 112 Mo. 633, 20

character of a party *as a party* in a civil suit may not be introduced unless involved in the issue and is not relevant to the question of testimony to support the character of a party in *the role of witness*. This distinction is pointed out in *Alkire Groc. Co. v. Tagart*.⁹ The remaining case of *Bank v. Richmond*¹⁰ denied the right to introduce rehabilitating evidence as to the character of a witness whose statement had been contradicted by other witnesses and does not involve the instant question.

A statement out of court contradictory to his testimony under oath may impeach the veracity of the witness or it may only establish a bias, interest or defect of memory. In either case an inference arises that his testimony is unreliable. If the discrepancy is due to a defective memory, bias or interest it is beside the issue to introduce testimony as to his reputation for truth speaking. Since such testimony only tends to rehabilitate the witness in one of several possible defects the question is whether the end attained would justify the necessary multiplication of issues. The rule forbidding the introduction of such testimony is supported by reason and is approved by one of the best writers on the subject.¹¹

It is clear that the supporting testimony should not be admitted merely to enable the jury to decide whether the witness had in fact made a prior inconsistent statement (he denying it) since mere contradiction among witnesses will not allow such support.¹²

The witness should of course be allowed opportunity to explain the inconsistency if he is able.¹³ If only part of a statement or conversation has been introduced he is entitled to have the whole presented to establish that in its entirety it was not inconsistent.¹⁴ Furthermore, the Supreme Court in the case of *State v. Sharp*¹⁵ allowed support thru the medium of prior consistent statements.

A somewhat different question is presented where the witness has been impeached by the character or type of cross examination used. This is not the case of a witness who on his cross examination admits prior misconduct. In that instance there is no logical ground for character witnesses to sustain him. A score of witnesses in support of his *character* could not erase the misdeed *which stands admitted*. Nor is it the case of a predicate laid in cross examination for his impeachment. The Supreme Court has denied the right to support in the case where the only impeaching matter has been laying of a predicate.¹⁶

S. W. 689; *Black v. Epstein* (1909) 221 Mo. l. c. 305, 120 S. W. 754.

9. (1898) 78 Mo. App. l. c. 168.

10. (1911) 235 Mo. l. c. 542, 139 S. W. 352.

11. 2 Wigmore's Evid. Sec. 1108.

12. *Bank v. Richmond* (1911) 235 Mo. l. c. 542.

13. 2 Wigmore's Evid. sec. 1044-6.

14. *Wilkinson v. Eilers* (1892) 114 Mo. 245, 21 S. W. 514. *State v. Phillips and Ross* (1857) 24 Mo. l. c. 485.

15. (1904) 183 Mo. l. c. 735, 82 S. W. 134.

16. *State v. Cooper* (1880) 71 Mo. l. c. 442.

That this type of impeachment goes to character and not credit is recognized by the court in the instant case where it speaks of a "cross examination tending to reflect on the *veracity* of the plaintiff."

The Supreme Court of Tennessee in *Richmond v. Richmond*,¹⁷ after a cross examination which it said was clearly meant to be a demonstration to the jury against the veracity of the witness, allowed testimony as to his reputation for truth. Louisiana,¹⁸ Vermont,¹⁹ and Virginia²⁰ follow this doctrine. A similar result has been reached in Texas,²¹ and Connecticut²² where the witness is a stranger at the place of trial.

The question again is: Should the harm done a party thru the imputation placed on his witness outweigh the harm of an increase of issues attendant on the admission of supporting evidence?

Such a cross examination is a direct attack upon character. In the hands of skillful counsel it is a dangerous weapon and may leave a lasting impression in the mind of the jury. The introduction of supporting evidence in the case of prior inconsistent statements did not solve the difficulty because it might have been the inconsistency of a veracious witness due to a defective memory. In this case the introduction of evidence as to character meets squarely the imputation placed on character.

Much of the effect of impeachment by this type of cross examination depends on the setting, on gesture, on emphasis, which cannot be incorporated into the record for review by an appellate tribunal. Where support is allowed to the impeached witness it would seem logical to make it discretionary with the trial judge.

J. A. W.

ALLOWING PUNITIVE DAMAGES FOR WRONGFUL DEATH—INSTRUCTIONS TO THE JURY. *State ex rel v. Ellison*.¹—Georgia B. Griggs brought an action under Section 5425 R. S. 1909,² for the death of her husband whom she alleged was killed by the negligence of the receivers of the Metropolitan Street Railway Co. in operating their street car.

The court instructed the jury that in ascertaining the amount of the damages they were to consider (a) the pecuniary loss to the plaintiff and (b) the facts constituting negligence. The receivers admitted that it was proper for the jury to consider the facts and circumstances surrounding the death of Charles Griggs in order to determine the ques-

17. (1837) 10 Yerg (Tenn.) 343.

18. *State v. Johnson* (1895) 47 La. Ann. 1225, 17 So. 789.

19. *Paine v. Tilden* (1848) 20 Vt. 554.

20. *George v. Pilcher* (1877) 28 Gratt. (Va.) 1. c. 316, 26 Amer. Rep. 350.

21. *Harris v. The State* (1906) 49 Tex. Cr. 1. c. 339, 94 S. W. 227.

22. *Rogers v. Moore* (1833) 10 Conn. 1. c. 15.

1. (1919) 213 S. W. 459.

2. "Whenever any person

tion of liability but contended that it was not proper to consider the nature of the negligent acts to enhance the damages. The supreme court, *en banc*, upheld this contention.

The basic principle of the law of damages is compensation to the plaintiff for an injury which he has suffered from the defendant's wrongful act.³ In addition to allowing the plaintiff compensatory or remedial damages, the common law also recognizes another class of damages known variously as punitive or exemplary damages or smart money. Punitive damages are not allowed in all tort actions, but only in those done in a wanton, willful or malicious manner.⁴ This rule is an anomaly, but it has found a firm and abiding place in our system of jurisprudence.⁵ The supposed justification for the rule is to punish the defendant for his wrongful act in order that he may be restrained from repeating the offense and to make an example of him in order that others may be deterred from perpetrating similar offenses.⁶ Such reasoning seems to lose sight of the essential justification of all damages, i. e. that he who has been injured shall be recompensed. If the defendant has committed a crime he should be brought before the proper criminal tribunal. The plaintiff has no rightful claim to such damages for, in theory at least, he has been fully recompensed when actual damages are allowed.

The relief granted is not commensurate with the damages suffered if the plaintiff may obtain punitive damages. Indeed, leaving out cases where special damages are recoverable it is hard to understand how the plaintiff sustains a greater loss if her husband has been maliciously killed than she would had he been killed only because of the defendant's negligence.

The wrongful death statute⁷ in Missouri which preceded the statute involved in the principal case had been construed to provide for punitive damages. The courts have held that this statute had both compensatory and penal features, but that the penal features overshadowed

shall die from injury resulting or occasioned by the negligence, unskillfulness, or criminal intent of any agent, servant, or employee, whilst running, conducting or managing any street, electric, or terminal car or train of cars the corporation in whose employ any such agent, servant, employee shall be at the time such injury is committed shall forfeit and pay as a penalty for every such person the sum of not less than two thousand, and not exceeding ten thousand dollars, in the discretion of the jury."

3. Greenleaf, Evidence, vol. 2, sec. 253 to 266; Sedgwick, Damages, Sec. 584.

4. *Ickenroth v. St. Louis Transit Co.* (1903) 102 Mo. App. 597, 77 S. W. 162; *Gray v. McDonald* (1891) 104 Mo. 1. c. 314, 16 S. W. 398.

5. Sedgwick, Damages, sec. 466.

6. *Whipple v. Walpole* (1839) 10 N. H. 130.

7. Sec. 2864 R. S. Mo. 1899 "... the corporation . . . in whose employ . . . the employee . . . shall be at the time any injury is received . . . shall forfeit and pay . . . five thousand dollars . . ."

the other element so that the plaintiff had always to bring suit for the maximum sum which was \$5,000.⁸ Thus, in a recent Missouri case the court in discussing this statute said: "The Legislature intended that the perpetrator of mischief sought to be prevented should pay the full penalty levied and did not intend that the private citizen should fritter away that penalty provided by virtue of the police power of the state for the purpose of preventing wrongs."⁹ In interpreting this act the court in *Gray v. McDonald*¹⁰ said that "aggravating and mitigating circumstances were well known to the law when used by the Legislature, so that the statutes . . . must mean that in these actions . . . the party suing may recover not only actual, but also exemplary, damages." In the light of these decisions and in view of the fact that it was difficult to tell just what part of the sum recoverable was penal and what actual damages, the circumstances of the act appear to have been proper facts for consideration by the jury on the question of damages.

Section 5425 R. S. Mo. 1909 changed the original act and allowed the injured party to recover not less than \$2,000 and not more than \$10,000 in the discretion of the jury. No express provision is made for considering the aggravating or mitigating circumstances of the offense. The earlier decisions interpreted this act as being wholly penal¹¹ and in support of this theory quite properly refused to allow any evidence to be introduced to show how much loss the plaintiff had sustained. But the circumstances of the offense were considered in determining the quantum of damages.¹² In the *Boyd* case¹³ these earlier decisions were overruled and the court held that this statute was penal as to \$2,000 but that any sum in excess of this sum was compensatory damages. This decision which has since been approved¹⁴ was also followed in the principal case. To recover \$2,000 the plaintiff need only show that the defendant committed the offense. To prove liability was to make a proper case for the granting of the penal sum but in excess of this sum the plaintiff must show actual damages.

Since it had been decided that the sum of \$2,000 was penal there was no necessity for considering the circumstances of the defendant's act to affect this sum. Nor would it seem proper to consider the act in

8. *Philpott v. Railroad* (1884) 85 Mo. 164; *King v. Railroad* (1889) 98 Mo. 235, 11 S. W. 563; *Casey v. Transit Co.* (1907) 205 Mo. 721, 103 S. W. 1146.

9. *Johnson v. C. M. and St. P. Ry. Co.* (1916) 270 Mo. 418, 193 S. W. 827.

10. (1891) 104 Mo. 314, 116 S. W. 398.

11. *Young v. Railroad* (1909) 227 Mo. 307, 127 S. W. 19.

12. *Ervin v. Railroad* (1911) 158 Mo. App. 1, 139 S. W. 498; *Pratt v. Railroad* (1909) 139 Mo. App. 502, 122 S. W. 1125.

13. *Boyd v. Railroad* (1912) 249 Mo. 110, 155 S. W. 13.

14. *Johnson v. C. M. & St. P. Ry. Co.* (1916) 270 Mo. 418, 193 S. W. 827.

15. *Sarasin v. Union Ry. Co.* (1899) 153 Mo. 485, 155 S. W. 92.

order to enhance the actual or compensatory damages for the character of the act would seem to bear no relation to the actual loss suffered. The court in the principal case intimates, but does not decide, that it would never be proper under this section to go into the facts of the wrongful death to enlarge or decrease the actual damages. Since this intimation is sound in principle it is hoped that it will prevail.

C. E. C.

AUTOMOBILES—DEGREE OF CARE—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE. *Threadgill v. United Railways Company of St. Louis.*¹—Laws 1911, p. 330, par. 12, subsec. 9, provides that automobiles shall be driven with "the highest degree of care that a very careful person would use under like or similar circumstances, to prevent injury or death to persons, on" etc.

In *England v. Southwestern R. R. Co.*,² the Springfield Court of Appeals said that tho the plaintiff (the driver of an automobile struck by a locomotive belonging to the defendant) was contributorily negligent in that he had not used *reasonable care*, the above mentioned statute placed him under the duty of using the highest degree of care. The remark with reference to the statutory duty was *dictum*.

In *Advance Transfer Co. v. Chicago, R. I. & P. Ry. Co.*,³ and *Hopkins v. Sweeney Automobile School*,⁴ the Kansas City Court of Appeals held that the driver of an automobile was under duty to use reasonable care to protect himself and that the statutory duty was the duty owed other persons, distinguishing *England v. Southwestern R. R. Co.*, *supra*. In *Hopkins v. Sweeney Automobile School*, *supra*, the court said that the statute, being in derogation of the common law, was to be strictly construed.

In *Stepp v. St. Louis-S. F. Ry. Co.*,⁵ the Springfield Court of Appeals followed the doctrine of the Kansas City Court of Appeals as set forth in the two last mentioned cases, endorsing the distinction the latter court had made of *England v. Southwestern R. R. Co.*, *supra*.

In *Threadgill v. United Railways Company of St. Louis*, *supra*, the Supreme Court of Missouri evidently took the position that the automobile driver must exercise the highest degree of care whether he was charged with negligence or contributory negligence. Graves, J. said, l. c. 165: "The person driving a motor vehicle has a rule of conduct prescribed for him by this statute. That rule of conduct is the 'highest degree of care'". But in *State ex rel v. Ellison*,⁶ Graves, J. said: "We

1. (1919) 214 S. W. 161.

2. (1915) 180 S. W. 32.

3. (1917) 195 S. W. 566.

4. (1917) 196 S. W. 772.

5. (1919) 211 S. W. 730.

6. (1919) 213 S. W. 459, l. c. 461.

have no degrees of negligence in Missouri, so far as the right to recover for negligence is concerned," which statement he limited to the "case in hand" which was under a statute not requiring the "highest degree of care".

It is submitted that there is but one degree of care applicable to all cases involving recovery for negligent acts or the defense of contributory negligence; that statutes and judicial opinions differentiating between *highest degree*, *slight* and *ordinary* are but prolific breeders of litigation, as shown by the above cited cases; and that the amount of care legally required is *due care under the circumstances*, the variance possible in the latter being infinite.

Authority for this is almost unlimited. In the Supreme Court of the United States it was said that "ordinary care in certain circumstances may be gross negligence under different circumstances."⁷ The same theory was announced in Maine in the case of *Raymond v. Portland R. R. Co.*,⁸ citing two Missouri cases⁹ among a large collection of authorities; in Massachusetts (the case involving the duty of a carrier to a passenger),¹⁰ in Pennsylvania,¹¹ Alabama,¹² California,¹³ Illinois¹⁴ and in the Federal Courts.¹⁵ The injuries in the above cases were caused by various instrumentalities from cattle to railroad trains.

On the question of the care required of the drivers of automobiles the New York court said: "The driver of an automobile is under a duty to use reasonable care but . . . it is manifest that what would be reasonable care and safe conduct in the case of a light and slow moving wagon often times would not amount to such conduct in the case of heavy and rapidly moving cars."¹⁶ The South Carolina court took "judicial notice that automobiles have a tendency to frighten animals" and said the "duty arises to use due care to prevent accidents but what is due care in

7. *Holladay v. Kennard* (1870) 12 Wall. 254, 20 L. Ed. 390; *Star of Hope* (1873) 17 Wall. 651, 21 L. Ed. 719; *Grand Trunk R. R. Co. v. Richardson* (1875) 91 U. S. 454, 33 L. Ed. 356; *Grand Trunk R. R. Co. v. Ives* (1891) 144 U. S. 408, 36 L. Ed. 485, 12 S. Ct. Rep. 679.

8. (1905) 100 Me. 529, 62 Atl. 602, 3 L. R. A. (N. S.) 94.

9. *McPheeters v. Hannibal etc. Ry. Co.* (1869) 45 Mo. 22; *Reed v. Western U. T. Co.* (1896) 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 A. S. R. 609.

10. *Coyser v. Taylor* (1857) 10 Gray 274. But see *Dodge v. Boston & B. S. S. Co.* (1889) 148 Mass. 207, 19 N. E.

373, 2 L. R. A. 83, 12 A. S. R. 541.

11. *Penn. R. R. Co. v. Ogier* (1860) 35 Pa. 60, 78 Am. Dec. 322.

12. *Matson v. Maupin & Co.* (1885) 75 Ala. 312.

13. *Fox v. Oakland C. St. Ry.* (1897) 118 Cal. 55, 50 Pac. 25, 62 A. S. R. 216.

14. *Chicago, R. I. & P. R. R. Co. v. Hamler* (1905) 215 Ill. 525, 74 N. E. 705, 1 L. R. A. (N. S.) 674, 106 A. S. R. 187, citing *McPheeters v. R. R.*, *supra*.

15. *Smith v. Day* (1898) 86 Fed. 62, *Carter v. Kansas City C. Ry. Co.* (1890) 42 Fed. 37.

16. *Mark v. Fritsch* (1909) 195 N. Y. 282, 88 N. E. 380.

one case may not be in another."¹⁷ The Delaware court in *Hannigan v. Wright*,¹⁸ after holding owners of automobiles and owners of other vehicles on the streets must each use reasonable care, said: "In determining therefore, the degree of care that the operator of an automobile should have used the jury must take into consideration its speed, size, appearance, manner of movement, the amount of noise it makes, and anything else that indicates unusual or peculiar dangers" and "the driver must take into consideration the character of his machine and its tendency to frighten horses."

In *McFern v. Gardner*,¹⁹ the St. Louis Court of Appeals (before the passage of Laws 1907, p. 73, incorporated in R. S. Mo. 1909, sec. 8523) said: "We can see no reason why the chauffeur in charge of an automobile, traveling on a public highway in a populous city should not be held to the same degree of care in respect to pedestrians and other vehicles upon the street as is a motorman in charge of a street car running on a public street." In *Hall v. Compton*²⁰ the Kansas City Court of Appeals, resting the matter squarely on the common law duty, said that the defendant was not liable if he was using due care, but that the possession of a powerful and dangerous vehicle imposed on the defendant the duty to use care commensurate with the danger to others engendered by the presence of his vehicle on the streets, citing with approval *McFern v. Gardner* and quoting the above excerpt. In *Haake v. Davis*,²¹ the same court, making no reference to a statute, said: "It was the duty of defendant in running his car to exercise care commensurate with the exigencies of the situation - - -. An ordinarily careful and prudent person in his position would have realized the danger of running thru a large, noisy, mixed crowd in any but the most cautious manner. In such cases the greatest care is only ordinary care."

The St. Louis Court of Appeals in the case of *Bongner v. Ziegenhein*²² cited *McFern v. Gardner*, *supra*, and *Hall v. Compton*, *supra*, as showing the correct duty as to the amount of care, tho the case came up under sec. 8523 R. S. Mo. 1909, requiring the highest degree of care that a very careful person would use under like or similar circumstances, the indential words of the statute²³ under which the Kansas City Court of Appeals decided *Hopkins v. Sweeney Automobile School*.²⁴ The latter

17. *Rochester v. Bull* (1907) 78 S. Car. 249, 58 S. E. 766.

18. 5 Pennewill's (Del.) Reports, 537, 63 Atl. 234, cited with approval in *Tudor v. Brown* (1910) 152 N. Car. 441, 67 S. E. 1015, the court saying the "duty is measured by the exigencies of the situation."

19. (1906) 121 Mo. App. 1, 97 S. W.

972.

20. (1908) 130 Mo. App. 675, 108 S. W. 1122.

21. (1912) 166 Mo. App. 249, 1. c. 255, 148 S. W. 450.

22. (1912) 165 Mo. App. 328, 147 S. W. 182.

23. Laws 1911, p. 330.

24. (1917) 196 S. W. 772.

court in *Ginter v. Donohue*,²⁵ an automobile injury case arising under sec. 8523 R. S. Mo. 1909, said that the "measure of care varies" and is "to be determined according to the exigencies of the situation," citing *Bongner v. Ziegenhein*, *supra*, and *Haake v. Davis*, *supra*. In *Meenach v. Crawford*²⁶ the Supreme Court of Missouri cited *McFern v. Gardner*, *supra*, (which held that a defendant must exercise ordinary care) as showing the duty under laws of 1911, p. 330, par. 12, subsec. 9.

Custom and habit are often of more force than logical principles. The confusion which has arisen is due to failure to recognize once for all that it is thoroughly impracticable to decide tort liability on the basis of different degrees of care. No doubt the courts are to blame for the legislature embodying within the statute the phrase "highest degree of care." But it would have been simple to have said that the legislature only intended to require that standard of care which is scientifically sound i. e. the care that a reasonably prudent person would exercise under the same circumstances. If the problem had been approached from that angle the Kansas City Court of Appeals would not have found it necessary to have said that the Statute under consideration was in derogation of the common law.²⁷

Professor John Chipman Gray in his "The Nature and Sources of the Law" says: (sec. 367) "A statute is the expressed will of the legislative organ of society, but until the dealers in psychic forces succeed in making of thought transference a working controllable force (and the psychic transference of the thought of an artificial body must stagger the most advanced ghost hunters), the will of the legislature has to be expressed by words, spoken or written."

Mr. Justice Holmes²⁸ says: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Thus, statutes must be interpreted by courts to give them meaning and they are interpreted thru the mind of the court. If the court think, as in the present case, that the statute logically covers the duty of a motor vehicle driver in all cases tho the statute does not specifically cover all cases, that is the law and as reasonable and sensible as an interpretation of a burglary statute, that provides for punishment of all persons, to exclude children under, say, five years of age. The court is "clear" in the latter case that the legislature "intended" their exclusion.

25. (1915) 179 S. W. 732.

26. (1916) 187 S. W. 879.

27. *Hopkins v. Sweeney Automobile School* (1917) 196 S. W. 772. See also sec. 8523 R. S. Mo. 1909 using the

same words as the present statute to describe the degree of care required of automobile drivers.

28. *Towne v. Eisner* (1917) 245 U. S. 425.

If the legislature use other words, e. g. highest degree of care, which are shown to mean only the care of a reasonable and prudent man in the circumstances why need the courts endeavor to find for them an impossible meaning?

The viciousness lies, of course, in their use in instructions, for as soon as a jury is told that the duty of an automobile driver is to use *the highest degree of care that a very careful person would use*, and it is impressed upon them by a zealous advocate that this is "not just ordinary care" etc., immediately the automobile driver becomes an insurer for the other person's safety.

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LOCAL AND SPECIAL LEGISLATION

BY

ROSCOE E. HARPER

NOTES ON RECENT MISSOURI CASES



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LOCAL AND SPECIAL LEGISLATION IN MISSOURI UNDER THE CONSTITUTION OF 1875

PART I. LOCAL AND SPECIAL LEGISLATION IN MISSOURI PRIOR TO CONSTITUTION OF 1875.

Chapter I. Growth of Local and Special Legislation Under Constitution of 1820.*

A. INTRODUCTION.

A general or public law is an act of the legislature which lays down a universal rule affecting the entire state or relating to all the members of any given class in the state. A special law is an act which operates only upon designated members of a class in the state, and does not affect all members of the class alike. If the members of the class thus selected out by the statute are private persons or private concerns it is called a private act. If the act singles one or more units of local government out of a general class of similar units, such as cities, townships, or counties, without any reasonable basis of classification, or if it applies only to a designated locality, it is known as a local act.¹

The Missouri Constitution of 1820² contained no limitations upon the power of the General Assembly to enact local and special laws. Neither was special or local legislation prohibited by any of the other twenty-three state constitutions in operation in

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1. For a more complete definition of general and special laws see Chapter IV, *infra*.

2. The Missouri Constitution of 1820 was drawn up by a constitutional convention assembled in St. Louis on June 12, 1820, and was adopted by the same body on July 17 of the same year; and it was with this Constitution that Missouri was admitted into statehood August 10, 1821. For a treatise on this subject see Shoemaker, First Constitution of Missouri, and also Missouri's Struggle for Statehood, by the same author.

1820.³ At that time bills granting divorces,⁴ relief from fines and penalties, special privileges, charters of incorporation, and local acts regulating the affairs of cities, counties and localities were frequently passed. This was recognized as a proper field for legislative activity.

During the first decade of statehood, Missouri was composed of sparsely settled, agricultural communities.⁵ Her needs were simple and her interests few. The common law adequately regulated the ordinary affairs of those pioneer days; and the general assemblies, without being overburdened, could easily satisfy all the demands for public, private, and local legislation. So the evils of special and local legislation were not prominent and aroused little, if any, protest.

The pioneer period had hardly ended when the new economic, industrial, and social forces, stimulated by recent inventions, opened up highways of commerce, and started the development of the natural resources of the state.⁶ A more complex state life was being evolved which required more extensive regulation and more careful adjustment from time to time. Consequently

3. Missouri was the twenty-fourth state admitted into the Union. The constitutions in operation in the other states were adopted in the following years; Ala. 1819; Conn., 1818; Del., 1792; Ga., 1798; Ill., 1818; Ind., 1816; Ky., 1799; La., 1812; Me., 1820; Md., 1776; Mass., 1780; N. H., 1792; Miss., 1817; N. J., 1776; N. Y., 1777; N. C., 1776; Ohio, 1802; Penn., 1790; R. I., 1663; S. C., 1790; Tenn., 1796; Vt., 1793; Va., 1776. Poore, *Constitutions and Charters*.

4. The Mississippi Constitution of 1817 required the legislature to pass on all divorces before they should be valid. "Divorces from the bonds of matrimony shall not be granted, but in cases provided for by law, by suits in chancery; provided that no decree for such divorce shall have effect until sanctioned by two-thirds of both branches of the General Assembly." . . . Section 17, Art. VI, Miss. Const. of 1817. The constitution of Alabama of 1819 had this same provision.

5. In 1820 Missouri had a population of 66,586, and was divided into ten counties. The population of St. Louis, the trading center for the vast territory lying west of the Mississippi, was only about 5,000. Viles, *History of Missouri*, pp. 108-119. Switzler, *History of Missouri*, pp. 285-296. *Ninth Census of the United States, Statistics of Population*.

6. Turner, *Rise of the New West (1819-1829)* pp. 84-95, vol. 14 in the American Nation Series. Also vol. 16 of same series. Hart, *Slavery and Abolition*, pp. 33-48. Bogart, *Economic History of the United States*, pp. 170-185. Coman, *Industrial History of United States*, pp. 207, 231. Coman, *Economic Beginnings of Far West*, vol. II.

each succeeding decade had an increased output of laws both public and private over the preceding decade.⁷

Altho the number of public acts increased steadily and apparently in arithmetical progression the quantity of local and special legislation seemed to increase in geometrical progression. More numerous and more insistent became the interests desiring favors from the legislature. The result was that public matters before the General Assembly were smothered and obscured by a multitude of private and local acts. Opposition was aroused to such legislation which finally led to its abolition.

A brief review of the character and quantity of legislation enacted by the succeeding general assemblies, operating under the Constitution of 1820, as recorded in the session acts, shows the growth of special and local legislation, and the necessity for its curtailment.

B. SUCCESSIVE PERIODS OF LEGISLATIVE ACTIVITY.

The time during which the Constitution of 1820, which contained no limitations on special and local legislation, was in operation may be conveniently divided into five periods. These five periods and the quantity and kinds of legislation enacted during each are shown in the following tables:

7. An interesting review of the economic legislation of this period in the neighboring state of Iowa, which prior to 1820 was a part of Missouri Territory, is given in, Pollack, Ivan L., *History of Economic Legislation in Iowa*.

LEGISLATION, PUBLIC AND LOCAL AND SPECIAL, 1820-1885⁸

Periods	Quant. of Legis.		Percent of Legis.		Av. No. of pages per assembly (2 yrs.)	
	Pub. pages	Loc. Pri. pages	Public	Private	Public	Loc.&Spec.
1. 1820-1831 (Ct. 1820) 1st to 6 G. A. (Inc.)	368 ⁹ (275 pub. acts)	207 ⁹ (140 spec. & loc. acts)	64% ⁹ (No. of acts 66%)	36% ⁹ (No. of acts 34%)	60 ⁹ (46 acts)	35 ⁹ (23 acts)
2. 1832-1843 7th-12th G. A. (Inc.)	625 ⁹ (600 pub. acts)	1050 ⁹ (1000 spec. & loc. acts)	38% ⁹ (No. of acts 38%)	62% ⁹ (No. of acts 62%)	104 ⁹ (100 acts)	175 (178 acts)
3. 1844-1853 13th-17th G. A. (Inc.)	663	2150	24%	76%	132	430
4. 1854-1859 18th-20th G. A. (Inc.)	540	3758	13%	87%	180	1252
5. 1860-1865 21st-23rd G. A. (Inc.)	462	1746	21%	79%	184	698 ¹⁰
6. 1865-1875 (Ct. of 1865) 23rd-28th G. A. (Inc.)	1460	2000	42%	58%	324	445 ¹⁰
7. 1875-1885 (Ct. of 1875) 29th-33rd G. A. (Inc.)	1376		100%		275	

8. It will be noted the number of acts and the number of pages in both of the first two periods have the same ratio and bear approximately the same per cent. Great difficulty was experienced in classification because, quite frequently, the same act was both public and private. So the figures above are only an approximation but it is believed even should the error of classification be as much as 10%, the value of the deductions drawn from them are not materially impaired.

9. Data on number of acts for given period. The acts were tabulated for first two periods only.

10. The first session of the 23rd General Assembly was held Dec. 26, 1864, under constitution of 1820; while the adjourned session of Nov. 1, 1865, was under the new constitution of 1865. For purposes of this chart one half of 23rd Assembly is classified in period 1860-1865, and one-half in period 1865-1875.

TABLE OF LOCAL AND SPECIAL LEGISLATION OF FIRST AND SECOND PERIODS 1820-1843

Period	Total No. of Loc. & Spec. Acts	Local		Relief from fines and penalties		Incorporation	
		% of Spec. Leg.	No. of acts	% of Spec. Leg.	No. of acts	% of Spec. Leg.	No. of acts
1. 1820 - 31 1st-6th G. A. Inc.	140	42%	60	25%	34	9%	13
2. 1832 - 43 7th - 12th G. A. Inc.	1000	25%	248	14%	140	27% ¹¹	272 ¹¹

	Roads, Bridges, Ferries.		Divorce		Legalizing acts of Exec. or Admr. or per- sons under disabili- ty		Miscellaneous	
	% of Spec. Leg.	No. of acts	% of Spec. Leg.	No. of acts	% of Spec. Leg.	No. of acts	% of Spec. Leg.	No. of acts
1. Continued	3%	4	10% 14 acts granted 18 divorces	14	7%	10	4%	5
2. Continued	24% ¹²	242 ¹²	4% 36 acts granted 72 divorces	36	6%	60	4.5%	45

(1) *Pioneer Period 1820-1831.*

During the first decade of statehood Missouri was a group of loosely knit, pioneer, agricultural communities.¹² Their legislative needs were few, and the common law sufficed for their simple requirements. The session acts of the first six general assemblies, contained approximately four hundred and fifteen acts of which sixty-six per cent was general and public.

11. Forty-three acts of incorporation were also acts laying out roads so they were counted twice.

12. Viles, *History of Missouri*, pp. 108-119. The population in 1820 was 66,586 and in 1830, 140,455. *Ninth Census of United States, Statistics of Population*.

An analysis of the one hundred and forty local and special acts which constituted thirty-four per cent of the acts passed during this period shows that sixty, almost one half, were local; thirty-four, twenty-five per cent, granted relief to officials or private persons from fines, penalties, or forfeitures; fourteen acts granted eighteen divorces; thirteen were charters of incorporation; ten legalized acts of administrators, executors and persons under disabilities; only four laid out roads or authorized the construction of bridges or operation of ferries; and five were on miscellaneous subjects.

(2) *Second Period 1832-1843.*

During this period the community life evolves to a higher level. Colleges are chartered, innumerable roads are laid out, and commerce and industry commence.¹³ Of the sixteen hundred acts passed by the six general assemblies of this period, only thirty-eight per cent are public in nature. Sixty-two per cent of all the acts as well as sixty-two per cent of all the pages, concern special and local legislation. While the number of general laws enacted during this period is slightly more than double the number passed during the preceding period, the number of private and local acts has increased eightfold.

There were one thousand local and special acts. Twenty-seven per cent of these, or two hundred and seventy-two acts, were acts of incorporation, of which sixty-six were acts incorporating colleges, academies, and charitable institutions; fifty-one, cities; and the remainder private corporations. It was during this period that the University of Missouri was organized. Twenty-four per cent, or two hundred and forty-two acts, concerned laying out roads, bridges and ferries. Almost fifty per cent of the special acts during this period were acts of incorporation or acts laying out highways as against ten per cent of the preceding

13. The population of Missouri in 1840 was 383, 702, an increase of over two and one-half times since 1830 and of six times since 1820. St. Louis in 1840 was a city of 16,500, an increase of three times its population of 1820. Viles, *History of Missouri*; *Ninth Census of United States, Statistics of Population*.

period. The local laws constituted only twenty-five per cent as compared with forty-five per cent of all local and special laws in the preceding period. It is to be noted that during this period there was a greater increase in special legislation than in local legislation and that the increase was felt chiefly in acts of incorporation and laying out highways. Acts granting relief to officials and private persons amount to fourteen per cent of the total of special and local legislation. It was during this period that the panic of 1837 took place. The Seventh General Assembly granted fifty divorces in one session. Eighteen railroads and sixteen insurance companies were chartered by the Ninth General Assembly in 1836-1837. These insurance companies entered into the banking business, and a subsequent legislature authorized the revocation of the charters of certain of them by quo warranto proceedings.¹⁴

Thus the session acts show clearly the changes in the life of the state from that of a pioneer community to a developing commercial, industrial, and agricultural community.

(3) *Third Period 1844-1853*

Because of the immensity of the task and the fact that the real object of this thesis is the special and local legislation under the Constitution of 1875, the special and local acts after the second period were not counted and analyzed. Only the pages devoted to the different types of legislation were enumerated; and again it is stated that while the figures are only approximate, due to difficulty in classification of laws which are both private and public in nature, it is believed that there is only the permissible error of ten per cent at most, and that such error as there may be will not in the least impair the value of the general deductions from the figures given.

During the third period, which is shorter by two years than the two previous periods, five general assemblies enacted over 2,800 pages of laws of which 2,150 pages, or seventy-six per cent, were of local and special laws. One-half of these pages

14. Session Acts, 12 G. A. (1836-37) p. 25.

is devoted to acts of incorporation. It was in 1852 that the first railroad was constructed in Missouri. It was during this period that began the rise of Missouri's cities and city population. During the decade 1840-1850, the population of St. Louis increased from 16,500 inhabitants in 1840 to 78,000 inhabitants in 1850, and by 1860 it reached the population of 160,000 inhabitants.¹⁵

The tremendous increase in legislation of a local and special nature now had attained such proportions as to be a recognized evil, so in the proposed constitution of 1845, we find a limitation on the power of the legislature to enact such legislation.¹⁶

(4) *Fourth Period 1854-1859*

This period included only six years, but during its brief existence more local and special laws were passed than during any previous period of twice its duration. Each of the three general assemblies averaged one hundred eighty pages of public laws and twelve hundred fifty-two pages of local and special laws. Only thirteen per cent of the contents of the session acts were public laws. While the amount of public legislation enacted during a general assembly had increased a little over three times since the first period, the quantity of local and special legislation enacted by the average legislature during this period was over thirty-five times as much as that passed by the average legislature of the first period. Public matters were thus being crowded out of the legislative halls in Jefferson City by the special interests demanding special and local legislation in much the same manner as the Arab was crowded out of his tent by the body of the camel whose head he had so kindly permitted to enter.

15. Viles, *History of Missouri*.

16. The constitutional convention of 1845 convened at Jefferson City November 17, 1845, and drew up a new constitution which was adopted January 14, 1846 by the convention, but was rejected by a vote of the people. Art. III, Sec. 32, provided: "The General Assembly shall not have power to grant a divorce in any case." This was the only limitation. The proposed Constitution of 1850, adopted by the Senate only, added a second limitation; Art. III, Sec. 37: "No private or special law shall ever be passed authorizing or legalizing the sale or conveyance of land or real estate belonging in whole or in part, to any person, or persons, under the age of twenty-one years."

(5) *Civil War Period 1860-1865*

Because of the influence of the war the quantity of the special and local legislation decreased. The session acts average slightly more than during the third period (1844-1853) and are of little interest.

At the close of this period, in 1865, the new Constitution of 1865 was drawn up and adopted, and its provisions as to local and special legislation, and their effect, will be the subject of the next chapter. Missouri contained 1,182,012 inhabitants in 1860, and was very unlike the Missouri of 66,586 inhabitants of 1820.¹⁷ The laws and regulations of an early period were unsuited for the full grown state. As Emerson says "the law is only a memorandum" of the existing cultivation of the population, and when the cultivation changes the laws must change.

Chapter II. The Limitations Upon Local and Special Legislation in the Constitution of 1865.

A. PROHIBITION OF LOCAL AND SPECIAL LEGISLATION UPON ENUMERATED SUBJECTS.

The Constitution of 1865,¹ Missouri's second constitution, imposed limitations upon the power of the General Assembly to pass local and special laws as follows:—

Article IV, Section 27: "The General Assembly shall not pass special laws divorcing any named parties; or declaring any named person of age; or authorizing any named minor to sell, lease, or encumber his or her property; or providing for the sale of real estate of any named minor or other person, laboring under legal disability, by any executor, administrator, guardian, trustee, or other person; or changing the name of any person; or

17. *Ninth Census of United States, Statistics of Population.*

1. The Constitution of 1865 was prepared by a convention assembled in St. Louis, January 6, 1865, was adopted by vote of a limited electorate, and went into operation July 4, 1865. Switzler, *History of Missouri*.

establishing, locating, altering the course, or affecting the construction of roads, or the building or repairing of bridges; or establishing, altering or vacating any street, avenue, or alley in any city or town; or extending the time for the assessment or collection of taxes; or otherwise relieving any assessor or collector of taxes from the due performance of his official duties; or giving effect to informal or invalid wills or deeds; or legalizing, except as against the State, the unauthorized or invalid acts of any officer; or granting to any individual or company the right to lay down railroad tracks in the streets of any city or town; or exempting any property of any named person or corporation from taxation. The General Assembly shall pass no special law for any case for which provision can be made by a general law; but shall pass general laws, providing, so far as it may deem necessary, for the cases enumerated in this section, and for all other cases where a general law can be made applicable."

It is to be noted that there are two classes of limitations in the above section. The first class contains the prohibitions of local and special legislation upon the enumerated general classes of subjects; and the final general limitation that the general assembly shall pass no special law in any case where a general law can be made applicable, constitutes the second class.

The prohibition upon the enumerated subjects is absolute, and the Supreme Court of Missouri declared at an early date that local and special laws passed upon those subjects would be unconstitutional.² The Supreme Court also said that the legislative body was without discretion as to the prohibited matters, and that the courts would refuse to give effect to any local and special laws upon the enumerated subjects.³

2. Adams, J., in *State ex rel Henderson v. County Court of Boone Co.* (1872) 50 Mo. 317, 323: "It is agreed that there is no discretion in regard to the passage of certain enumerated laws. They are inhibited by the letter of the Constitution. When the Legislature undertakes to pass these inhibited laws, it is the plain duty of the courts to declare them unconstitutional."

3. Also Bliss, J., in *State of Missouri ex rel Robbins v. The County Court of New Madrid* (1872) 51 Mo. 82, 86: "The section containing the above constitutional clause contains an express prohibition against legislation in regard to various matters, and it is not disputed that this prohibi-

A number of other states incorporated similar provisions into their constitutions forbidding laws upon enumerated subjects, and the courts of these states adopted the same view as the Missouri Supreme Court that the courts should determine whether a law conflicted with the given prohibitions.⁴

B. THE GENERAL PROHIBITION.

The second class is defined by the final general provision of the section which is as follows: "The General Assembly shall pass no special law *for any case for which provision can be made by a general law*, but shall pass general laws, providing, so far as it may deem necessary, for the cases enumerated in this section, *and for all other cases where a general law can be made applicable.*" In the above quotation some words have been italicized for the purpose of emphasizing that it is in the interpretation and effect given to them by the decisions that the distinction arises between the two classes.

The question at once arose in whom lay the power of determining whether a general law could be made applicable and whether a local or special law was necessary. The legislature claimed that this power remained in it, while it was contended by others that the power was conferred upon the courts to enforce this provision in the Constitution, and to declare local and special laws void where the court found a general law could have been made applicable, the same as in the preceding enumerated classes.

The Senate in the first session of the General Assembly under the new Constitution, sought a determination by the Supreme Court of the validity of proposed special legislation before it by using the newly made device of propounding a question to that court.⁵ The Supreme Court in refusing to answer the question

tion is absolute, that the legislative body is without discretion as to those matters, and that the court would refuse to give effect to any act which disregarded it."

4. *State v. Des Moines* (1896) 96 Iowa 521, 65 N. W. 818, 59 Am. St. Rep. 381; *Knopf v. People* (1900) 185 Ill. 20, 57 N. E. 22, 76 Am. St. Rep. 17. Also see note, 93 Am. St. Rep. 106, 107.

5. The Constitution of Missouri of 1865 in Article 6, Section 11, provided: "The judges of the Supreme Court shall give their opinions

said: "The executive and legislative branches of the government are the proper judges of their own constitutional powers and duties in general, and in the first instance."⁶

In *State v. Ebert*,⁷ the first case upon this question, it was contended that a local act creating a special Court of Criminal Correction for St. Louis was void because a general law could have been made applicable. But the court, without passing upon the question whether it was the exclusive province of the legislature or of the court in the last instance to determine the necessity of a local law, held that a necessity did exist in that case, for the creation of such a court in St. Louis where petty crimes particularly flourished; and that a similar law would not be necessary in the rest of the state.⁸

The next case, *State of Missouri ex rel Dome v. Wilcox*,⁹ presented the question whether a local option school law was valid under the constitutional inhibition of local legislation. Wagner, J., in an eminently sound decision held the law valid because its operation was co-extensive with the state. He also said that the prohibition in question "was intended to apply to acts, persons, and localities specifically,"¹⁰ and the opinion inti-

upon important questions of constitutional law, and upon solemn occasions, when required by the Governor, the Senate, or the House of Representatives; and all such decisions shall be published in connection with the reported decisions of said court."

6. Answer to Questions by Senate, December 9, 1865, 37 Mo. 136, 138. One of the questions asked was: "Can the General Assembly so alter, change, or modify, the act of any incorporated company doing business as to enlarge its powers, change its number of directors, or add new branches of business to its functions, provided such change, alteration, or modification, does not destroy the original object contemplated in the act of incorporation." The court refused to pass upon this question because it was not an "important question of constitutional law and upon a solemn occasion."

7. (1867) 40 Mo. 186.

8. Wagner, J., delivering the opinion of the court in *State v. Ebert* (1867) 40 Mo. 186, loc. cit. 191, said: "The court itself would not be necessary throughout the State, nor would a general law with like or similar provisions be applicable to the whole State."

9. (1870) 45 Mo. 458.

10. (1870) 45 Mo. 458, 465. Wagner, J., continues: "Special statutes relate to certain individual classes or particular localities. Had the act applied to a certain specified town or a single corporation, it would have been special, but such is not the case. It is coextensive with the State and its influence is felt in every county and almost every township."

mates that it is the proper function of the court to declare such laws void under the general prohibition.

In *State ex rel Circuit Attorney v. Railroad*¹¹ a special act amending the charter of a railroad corporation granted by a special act of the General Assembly in 1859, was upheld under a provision in the Constitution providing for the amendment of existing laws, without passing upon the question of legislative discretion as to the necessity of special legislation.¹²

It was not until 1872 in *State of Missouri ex rel Henderson v. County Court of Boone County*¹³ that it was decided that the court had no power to review special and local laws passed by the legislature as to their constitutionality under the general prohibition. Adams, J., in giving the opinion of the court said: "But here we are asked to pronounce upon the necessity of a law, and whether it can be better supplied by a general law than a special act. This is the exercise of the discretion of the courts to control the discretion of legislature. I am not satisfied that this can be done."¹⁴ The question involved was the constitutionality of an act of the legislature creating a court for Boone County. Adams, J., also upheld the act upon a second ground that the legislature was given power to establish inferior courts from time to time. Bliss, J., in a separate opinion concurred with Adams, J., upon the power of the legislature to determine the necessity for special legislation. He said: "When the prohibition is absolute it cannot be evaded, and should be enforced by both the legislature and judiciary. When it is limited and conditional, and upon a question upon which judgment must be exercised and an opinion formed, the argument is certainly plausible that the body called upon to act must exercise that judgment."¹⁵

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11. (1871) 48 Mo. 468.

12. Article XI, Section 3, Constitution of 1865 provided: "All statute laws of this state now in force, not inconsistent with this constitution, shall continue in force until they shall expire by their own limitation, or be amended or repealed by the General Assembly."

13. (1872) 50 Mo. 317.

14. (1872) 50 Mo. 317, 323.

15. (1872) 50 Mo. 317, 326. Bliss, J., fully recognized the evils of local and special legislation when he further said on the same page: "It

Later in the same year, the same court reaffirmed its position upon this question in a similar case, *State ex rel Robbins v. County Court of New Madrid*,¹⁶ in which a local act of the General Assembly authorizing New Madrid and other named counties to levy a special school tax was upheld. Bliss, J., in the course of the opinion reasoned as follows: "A local law is considered necessary, and the act is passed. Where do we get appellate power in the case, the power to review legislative discretion * * * a discretion expressly required to be exercised by the legislative body? I cannot find it in the relation we hold to that body, and in the obligation we are under to resolve every doubt in favor of the legality of their acts. If it were intended to make the prohibition absolute as to certain acts, they would have been included in those expressly provided against."¹⁷

It is noteworthy that Wagner, J., who delivered the opinion of the court in the three earlier cases, *State v. Ebert*, *State ex rel Dome v. Wilcox*, and *State ex rel Circuit Attorney v. Railroad*, dissented in *State ex rel Henderson v. County Court of Boone County* and in *State ex rel Robbins v. County Court of New Madrid* on the ground that a general law could be made applicable in those two latter cases and that in such cases it was the plain duty of the court to declare such local and special laws void. In his dissenting opinion in *State ex rel Henderson v. County Court of Boone County* he distinguished the former cases of *State v. Ebert* and *State ex rel Dome v. Wilcox* in that the local laws in question in those cases were necessary, and were as general as was consistent with their scope and design in order to effectuate the object in view. But in the case then before the court he was of the opinion that there was no necessity for a local act, that a general law could be made applicable to attain the end sought, and that the court should exercise the power re-

is seven years since the Constitution went into operation. During every session of the Legislature it has construed, and, as I understand it, violated the provision under consideration. - - - I must treat the clause as directory, binding upon the conscience of legislators, but if disobeyed, the courts cannot furnish the remedy."

16. (1872) 51 Mo. 82.

17. (1872) 51 Mo. 82, 87.

posed in it of declaring the act void and unconstitutional. He then pointed out the evils that would result from the decision of the court: "It seems to me that if the courts concede that the whole matter rests with the Legislature, the result will be a virtual abolition of this clause in the Constitution. The prohibition against special legislation will be practically a dead letter. As it is the practice in the Legislature to yield and grant any local measure asked by any representative in that body, it is only necessary to demand a particular enactment for a special purpose, and if there is no constitutional constraint, it is passed as a matter of course. The legislative discretion in such cases extend only to the representations of the member who is interested in the passage of the bill."¹⁸

The decision in *State ex rel Henderson v. County Court of Boone County* produced the evils so accurately forecasted by Wagner, J., but nevertheless it remained the ruling case in this subject as to all laws passed under the Constitution of 1865.¹⁹ The Constitution of 1875 abolished the doctrine by the insertion in the general prohibition of local and special legislation of the clause that "whether a general law could have been made applicable in any case is hereby declared a judicial question and as such shall be judicially determined, without regard to any legislative assertion on that subject."²⁰

A number of other states at the time the Constitution of 1865 was in operation had similar constitutional provisions prohibiting in a general clause local and special legislation whenever a general law could be made applicable. A majority of the courts reached the same result as the Supreme Court of Missouri, while a strong minority supported the views of Wagner, J., that it was a judicial question.²¹

Local and special legislation under the Constitution of 1865

18. (1872) 50 Mo. 317, 331.

19. *Hall v. Bray* (1873) 51 Mo. 288; *Ensworth v. Curd* (1878) 68 Mo. 282.

20. Const. of 1875, Mo. Art. IV, Sec. 53, subdivision 32.

21. The following cases are in accord with *State of Missouri ex rel Henderson v. County Court of Boone County*, holding that the determination of the necessity of a local law is solely a legislative question; *Little*

was substantially reduced. At least all local and special legislation upon the forbidden enumerated subjects was done away with. But still over half of the pages of the session acts was devoted to local and special laws which came through the breach made in the provision of the Constitution of 1865 prohibiting unnecessary local and special legislation by the decision in *State ex rel Henderson v. County Court of Boone County*; and it remained for the Constitution of 1875 to stop this gap.

PART II. LOCAL AND SPECIAL LEGISLATION UNDER THE CONSTITUTION OF 1875.

Chapter III. The Adoption of the Provisions Against Local and Special Legislation in the Constitution of 1875.

The Constitution of 1875¹ effectually prohibited the enactment of local and special legislation. It accomplished this result by extending the list of enumerated classes of subjects concerning which no local or special laws should be passed, and by intrusting the courts with the power of determining whether a general law could be made applicable. A study of the proceedings of the constitutional convention of 1875 will reveal by what processes that body achieved its object.

Rock v. Parish (1880) 36 Ark. 166, 172; *Brown v. City of Denver* (1884) 7 Colo. 305, 310, 3 Pac. 455; *Sanitary District of Chicago v. Wray* (1902) 199 Ill. 63, 64 N. E. 1048, 93 Am. St. Rep. 102; *Pennsylvania Co. v. State* (1895) 142 Ind. 428, 439, 41 N. E. 937; *State v. Hitchcock* (1862) 1 Kans. 173, 178, 81 Am. Dec. 503; *McGill v. The State* (1877) 34 Ohio State 228. *Contra*, holding that it is a judicial question: *Clarke v. Irwin* (1869) 5 Nev. 111, 124; *Ex Parte Fritz* (1859) 9 Iowa 30, 33; *Semle, People v. Mullender* (1901) 132 Cal. 217, 64 Pac. 299. See also notes: 93 Am. St. Rep. 106; 14 L. R. A. 566.

1. The Constitution of 1875 was adopted on August 2, 1875, by a constitutional convention assembled in Jefferson City on May 5, 1875, and was ratified by the voters of Missouri, October 30, 1875. It went into operation November 30, 1875. For the adoption of the constitution in the constitutional convention see Supp. to Journal 96 August 2, 1875.

The members of the constitutional convention of 1875² assembled with a determination to correct a number of evils that had arisen in the preceding decades; but of these evils perhaps there was none upon which there was a greater unanimity of opinion as to the remedy than that of special legislation.

On the third day of the convention a resolution was introduced by Mr. Switzler that the legislative committee "report a provision specifying in detail the subjects concerning which the General Assembly shall pass no laws."³ Three days later another resolution was offered which proposed twenty-five classes of subjects concerning which no local or special law should be enacted.⁴ During the seventh week Mr. Brockmeyer, chairman of the committee on the legislative department, reported out of the committee a proposed article of "Limitation on Legislative Power,"⁵ which contained the section prohibiting local and special laws⁶ that later became section fifty-three of article four of the adopted constitution.

This section on local and special laws was adopted with little change and upon very little debate. The proposed section contained thirty-one subdivisions of which the first twenty-nine were adopted without debate. The last one was finally adopted without amendment after debate and only one was actually amended. Two more subdivisions were added by amendment.⁷

The section as adopted stood as follows:

"Sect. 53. *Special and local laws prohibited.* The General Assembly shall not pass any local or special law:

2. The constitutional convention assembled at Jefferson City on May 5, 1875. There were sixty-eight members elected from thirty-four districts. Waldo P. Johnson of Osceola was elected President. The convention adjourned August 2, 1875.

3. J. 49. May 7, 1875. The references are to the original journal not printed.

4. J. 61. May 10, 1875.

5. J. 305. June 24, 1875. This proposed article became substantially sections forty-three to fifty-six inclusive of article four of the constitution as adopted.

6. J. 307-308. This was section eleven in the proposed article. See J. 369-372, June 30, for the adoption of this section.

7. J. 370, 371. These two subdivisions became nos. thirty and thirty-one of the section as adopted.

- (1) Authorizing the creation, extension or impairing of liens;
- (2) Regulating the affairs of counties, cities, townships, wards or school districts;
- (3) Changing the names of persons or places;
- (4) Changing the venue in civil or criminal cases;
- (5) Authorizing the laying out, opening, altering or maintaining roads, highways, streets or alleys;
- (6) Relating to ferries or bridges, or incorporating ferry or bridge companies except for the erection of bridges crossing streams which form boundaries between this and any other state;
- (7) Vacating roads, town plats, streets, or alleys;
- (8) Relating to cemeteries, grave-yards or public grounds not of the state;
- (9) Authorizing the adoption or legitimation of children;
- (10) Locating or changing county seats;
- (11) Incorporating cities, towns or villages, or changing their charters;
- (12) For the opening and conducting of elections, or fixing or changing the places of voting;
- (13) Granting divorces;
- (14) Erecting new townships, or changing township lines, or the lines of school districts;
- (15) Creating offices, or prescribing the powers and duties of officers in counties, cities, townships, election or school districts;
- (16) Changing the law of descent or succession;
- (17) Regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts, justices of the peace, sheriffs, commissioners, arbitrators or other tribunals, or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate;
- (18) Regulating the fees or extending the powers and duties of aldermen, justices of the peace, magistrates or constables;

(19) Regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes;

(20) Fixing the rate of interest;

(21) Affecting the estates of minors or persons under disability;

(22) Remitting fines, penalties and forfeitures, or refunding moneys legally paid into the treasury;

(23) Exempting property from taxation;

(24) Regulating labor, trade, mining or manufacturing;

(25) Creating corporations, or amending, renewing, extending or explaining the charter thereof;

(26) Granting to any corporation, association or individual any special or exclusive right, privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track;

(27) Declaring any named person of age;

(28) Extending the time for the assessment or collection of taxes, or otherwise relieving any assessor or collector of taxes from the due performance of their official duties, or their securities from liability;

(29) Giving effect to informal or invalid wills or deeds;

(30) Summoning or empaneling grand or petit juries;

(31) For limitation of civil actions;

(32) Legalizing the unauthorized or invalid acts of any officer or agent of the state, or of any county or municipality thereof. In all other cases where a general law can be made applicable, no local or special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined, without regard to any legislative assertion on that subject;

(33) Nor shall the General Assembly indirectly enact such special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed."

The debate was centered upon the last two subsections. The second sentence of the thirty-second subdivision as originally re-

ported stood as follows: "In all other cases where a general law can be made applicable, no local or special law shall be enacted; and whether a general law could have been made applicable in any case (is hereby declared to be a judicial question, and as such) shall be judicially determined, without regard to any legislative determination thereof."⁸ Attempt was first made to amend this part by striking out all following the word "enacted."⁹ Another unsuccessful attempt to amend it by striking out the first clause, "In all other cases where a general law can be made applicable"¹⁰ was followed by the adoption of an amendment changing the last two words of the subdivision from "determination thereof" to "assertion on that subject."¹¹ This section was then adopted and referred to the committee on revision where slight changes were made in the sentence above quoted,¹² and then reported out by that committee in the form finally adopted.¹³

An amendment to the last subdivision was proposed to read: "Nor shall the General Assembly indirectly enact such special or local law by the partial repeal of a general law, *or enact a general law which by its provisions is to be in force and effect only in such counties as first by a vote of a majority of qualified voters therein at an election held for that purpose may vote and adopt;* But laws repealing local or special acts may be passed."¹⁴

The italicized clause is the part that was added by the amendment. The effect of such a provision would have been to have made local option laws impossible. Fortunately the author of this amendment was dissatisfied with it because he thought that it might be evaded by leaving a law to the "vote of the people" rather than to the "vote of a majority of qualified voters,"

8. J. 308. The provision that whether a general law could have been made applicable is a judicial question is the result of the decision in *State ex rel Henderson v. County Court of Boone Co.* (1872) 50 Mo. 317.

9. J. 369. Amendment offered by Mr. Lay.

10. J. 369, 370. Mr. Massey offered the amendment.

11. J. 371. The amendment was offered by Mr. Gantt.

12. The changes consisted in omitting the parenthesis and words "to be" from "is hereby declared 'to be' a judicial question."

13. J. 630. Article IV was reported out and adopted on Wednesday, July 28, 1875 (J. 614-630).

14. J. 371. Mr. Edwards of Iron County moved the amendment.

so upon a reconsideration of the amendment he withdrew it with unanimous consent. He then introduced the amendment a second time with "vote of the people" in the place of "vote of a majority of qualified voters" in the first amendment. This second proposal failed leaving the section in the form in which it originally stood and was finally adopted.¹⁵

A discussion of the limitations upon local and special laws contained in section fifty-three of article four of the constitution is not complete without reference to the provisions for the adoption of local and special laws embodied in section fifty-four of the same article. This section provides: "Sec. 54. *Local and Special laws, notice of.*—No local or special law shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be effected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least thirty days prior to the introduction into the General Assembly of such bill, and in the manner to be provided by law. The evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed, and the notice shall be recited in the act according to its tenor."

The first clause of the section as reported out of the committee read as follows: "No local or special bill, *other than those provided for in the preceding section*, shall be passed" etc.¹⁶ The part italicized, was stricken out by amendment. Another amendment substituted "shall state the substance of the contemplated law, and shall be published"¹⁷ for "shall be"; and, with the further changes of "bill" in the first line to "law" and the addition at the end of "and the notice shall be recited in the act according to its tenor,"¹⁸ the section was adopted.

15. J. 371, 372. A resolution directed against making general laws take effect upon adoption in a locality was introduced early in the convention by Mr. Edwards of Iron County. J. 99. A review of the proceedings and debates of the constitutional convention which concerned the adoption of the limitations upon local and special legislation is found in the dissenting opinion in *Owen v. Baer* (1899) 154 Mo. 434, 479-493, 55 S. W. 644, 657-661.

16. J. 371.

17. J. 372.

18. J. 372.

The members of the constitutional convention regarded the incorporation of sections fifty-three and fifty-four into the constitution as a strong argument in favor of its adoption. In an address to the people of Missouri which accompanied the proposed constitution the convention directed the attention of the people to the provisions concerning local and special legislation as one of "the more important changes proposed."¹⁹

"The evils of local and special legislation have become enormous" says the address. "We need but look to our session acts to be satisfied that this species of legislation occupies the larger portion of the time of our General Assemblies, to the neglect and prejudice of public interests. The expense to the state in passing and publishing such laws and the combinations by which private interests have been advanced and dangerous monopolies created are well known.

"Under the proposed Constitution the General Assembly is prohibited from passing such laws. In all cases where a general law can be made applicable, a special law cannot be enacted, and in no case can any local or special law be passed unless notice of the intention to apply therefor shall have been published for thirty days in the locality to be affected thereby."²⁰

A comparison of the session acts of the first five general assemblies operating under the new Constitution of 1875 with the session acts of the previous general assemblies shows that the framers of the Constitution of 1875 succeeded in restricting local and special legislation in an effective manner.²¹ The average number of pages in the session acts of a general assembly during this period was only two hundred seventy-five as compared with seven hundred sixty-nine during the operation of the Constitution of 1865, and with fourteen hundred thirty-two during the period immediately preceding the Civil War. Practically one hundred per cent of these acts was general as opposed to the forty-two per cent of the preceding period, or to the thirteen per

19. Supp. 83, August 2, 1875.

20. Supp. 86, August 2, 1875.

21. See table on p. 6, *ante*, for tabulation of the quantity of legislation during the several periods.

cent during the fourth period which preceded the Civil War. The expectations of the members of the constitutional convention that the provisions restricting local and special legislation would be effective and wholesome have been amply justified.

An interesting study is the comparison of the provisions concerning local and special legislation in the Constitution of Missouri of 1875 with the other state constitutions in operation in 1875. Mr. Dry in *The Article on the Legislature in the Missouri Constitution of 1875*²² has done this in a careful manner. He found that, out of thirty-six constitutions in operation in sister states only nineteen possessed limitations upon the power of the legislature to enact local and special laws.²³ Eighteen constitutions contained lists of enumerated subjects upon which no local or special laws could be passed; but none of the eighteen possessed so long a list as did the Constitution of Missouri.²⁴

The limitations upon the power of the legislature to enact local and special laws contained in the Constitution of Pennsylvania of 1873 probably formed a basis for the corresponding provisions in the Constitution of Missouri of 1875.²⁵ Twenty-seven provisions in the Constitution of Pennsylvania are found in the Constitution of Missouri, twenty-six being in the same order; and the same wording is used in both constitutions except in four subdivisions where there are slight changes.²⁶ It is not surprising that the decisions of the courts of Pennsylvania should be followed in Missouri upon the interpretations of those clauses.

22. A thesis submitted in partial requirement for the degree of Master of Arts. see pp. 137-152.

23. Dry, *The article on the Legislature in the Missouri Constitution of 1875*, p. 147.

24. The constitutions which had the more extended lists of subjects were as follows: Pa., Const. of 1873, III, 7 (twenty-seven subjects); W. Va., Const. of 1872, VI, 39 (nineteen subjects); Ind., Const. of 1851, IV, 22 (seventeen subjects); Fla., Const. of 1868, V, 17 (fourteen subjects); Ore., Const. of 1857, IV, 23 (fourteen subjects); N. Y. Const. of 1846, III, 18 (fourteen subjects); Nev. Const. of 1864, IV, 20 (thirteen subjects).

25. Dry, *The Article on the Legislature in the Missouri Constitution of 1875*, pp. 147, 196.

26. Const. of Pa., 1873. Art. III, Sec. 7, subdivision 53, 54.

Chapter IV. Definition of Local and Special Laws.

At the outset the question arose what is a local or special law. In *State ex rel Lionberger v. Tolle*¹ the definition of a special law laid down by the Supreme Court of Pennsylvania in *Wheeler v. Philadelphia*² was adopted "that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special."³ It was quite natural that the Missouri court should follow the Pennsylvania court since the Constitution of Missouri of 1875, incorporated in section fifty-three of article four, the provisions of the Pennsylvania Constitution against special legislation as noted in a previous chapter.⁴

This definition was qualified in *State ex rel Harris v. Herrmann*.⁵ The court, following the New Jersey court in *State ex rel Richards v. Hammer*,⁶ held that a law which applied only to those members of a class which was determined by an *existing state of facts was special and invalid*. A law to be general must operate in the future upon those individuals who become members of the class after the enactment of the law and during the time the law is in operation.⁷ This question has most fre-

1. (1880) 71 Mo. 645, 650.

2. (1875) 77 Pa. St. 338, 348.

3. This definition has been cited and followed with approval in the following Missouri cases: *Lynch v. Murphy* (1893) 119 Mo. 163, 24 S. W. 774; *Dunne v. K. C. Cable Ry.* (1895) 131 Mo. 1, 5, 32 S. W. 641; *Owen v. Baer* (1899) 154 Mo. 434, 477, 55 S. W. 644.

4. See p. 25.

5. (1882) 75 Mo. 340, 352.

6. (1880) 42 N. J. L. 435, 438.

7. In the following cases laws were declared unconstitutional because they applied to a class determined by an existing state of facts: *State ex rel Harris v. Herrman* (1882) 75 Mo. 340 (an act providing for the appointment of notaries public in all cities having a population of one hundred thousand or more with the provision that "the office of any notary public in *such city* holding a commission bearing *date prior* to the passage of this act, and whose term of office has not expired *at the time this act becomes law*, shall be abolished at the expiration of ten days after the taking effect of this act"); *State ex rel Board v. County Court of Jackson County* (1886) 89 Mo. 237, 1 S. W. 307 (an act establishing a re-

quently arisen in the classification of cities and counties by population. Consequently a general law applicable to cities of a given population must apply to all cities which attain that population in the future,⁸ and must cease to apply to all cities whose population is no longer of the required number.⁹

A further qualification of the original definition of a general law was made in *State ex rel Atty. Gen. v. Miller*¹⁰ in which the court again relied upon *State ex rel Richards v. Hammer*.¹¹ It was said "to make such a law general there must be some distinguishing peculiarity which gives rise to a necessity for the law as to the designated class."¹² This view was affirmed in *Dunne v. K. C. Cable Ry. Co.*¹³ In these cases the courts found a reasonable necessity for the classification in question.¹⁴ The rule laid down in these two cases was criticized by Marshall, J., in

form school "in all counties in this state in which is located a city of over fifty-thousand inhabitants"); *State ex rel Kehr v. Turner* (1907) 210 Mo. 77, 82, 107 S. W. 1064 (an act which provided that "no dramshop license shall hereafter be granted to any persons to keep a dramshop within five miles of any state educational institution which now has enrolled fifteen hundred or more students," the State University being the only institution that could ever come under the provisions of the act).

8. *Rutherford v. Heddens* (1884) 82 Mo. 388, 391; *State ex rel Board v. County Court of Jackson County* (1886) 89 Mo. 237, 1 S. W. 307; *State ex rel Martin v. Wofford* (1893) 121 Mo. 61, 68, 25 S. W. 851; *Kansas City v. Stegmiller* (1899) 151 Mo. 189, 205, 52 S. W. 723.

9. *State ex rel Major v. Ryan* (1910) 232 Mo. 77, 133 S. W. 8.

10. (1890) 100 Mo. 439, 13 S. W. 677.

11. (1880) 42 N. J. L. 435.

12. (1890) 100 Mo. 439, 448, 13 S. W. 677. The court continued: "A mere classification for the purpose of legislation without regard to such necessity is simply special legislation of the most pernicious character and is condemned by the constitution. Mere differences which serve for a basis of classification for some purposes, amount to nothing in a classification for legislative purposes, unless such differences are of a character as, in the nature of things, to call for and demand separate laws and regulations."

13. (1895) 131 Mo. 1, 32 S. W. 641.

14. "It is natural, proper, and reasonably necessary to the well being of our public schools that in cities having so large a population there should be more directors than in cities having a much less population. The vast amount of property to be managed, and the school houses to be erected and the schools to be maintained, make it necessary that these large school corporations should be equipped with a large number of directors. There is, therefore, a fair and reasonable necessity for a classification for legislative purposes in this respect." Black, J., in *State ex rel Atty. Gen. v. Miller* (1890) 100 Mo. 439, 450, 13 S. W. 677. "There also appears a reasonable necessity for the classification. The selection

*Owen v. Baer*¹⁵ and he made the statement that it was "no longer the law in this state."¹⁶ Notwithstanding this statement Marshall, J., in the following year in *Ex Parte Lucas*¹⁷ sustained a classification of cities in a law licensing barbers in cities of over 50,000 inhabitants on the ground that there was a "greater necessity for regulations to prevent the spread of contagious diseases thru barber shops in larger cities, than exists for such regulations in smaller places."¹⁸

Subsequent cases have applied this qualification and it is the law today. In *State ex inf Hadley v. Washburn*,¹⁹ Valliant, J., had this requirement in mind when he wrote: "Therefore the law is not within the constitutional inhibition because it is designed to operate on one class only, provided the conditions reasonably justify the distinguishing of the class, and provided it affects equally all who come within that class." This passage was cited with approval and followed in *Ex Parte Loving*.²⁰ Lamm, J., cited *Dunne v. K. C. Cable Ry. Co.* and the doctrine that it laid down as authority for his decision in *State ex rel Major v. Ryan*.²¹ *State ex rel Garesche v. Roach*²² was decided

of juries under the general law, in counties containing large cities, is liable to much abuse. Complaint of the character of juries selected was common. The law was intended to correct this evil, and to do so the classification was deemed necessary." MacFarlane, J., in *Dunne v. K. C. Cable Ry. Co.* (1895) 131 Mo. 1, 6, 32 S. W. 641.

15. (1899) 154 Mo. 434, 462, 55 S. W. 644. Marshall, J., criticized *State ex rel Atty. Gen. v. Miller* (1890) 100 Mo. 439, 13 S. W. 680, as follows: "The difficulty left by this decision is that the *distinguishing features or peculiarities* which can give rise to the *necessity* for an act, are not specified, so that the legislature, or the bar, can understand and observe them but two acts may be passed in the same term, relating to different subjects, and one may be held general and the other special, and no one will know which is general and which is special until the Supreme Court says there are *distinguishing peculiarities* which gave rise to the *necessity* for the one and not for the other."

16. (1899) 154 Mo. 434, 479, 55 S. W. 644.

17. (1900) 160 Mo. 218, 61 S. W. 218.

18. (1900) 160 Mo. 218, 235, 61 S. W. 218.

19. (1901) 167 Mo. 680, 689, 67 S. W. 592.

20. (1903) 178 Mo. 194, 77 S. W. 508. Fox, J., p. 209; "If the conditions reasonably justified the distinguishing of the class, and the provisions of the act affect equally all who come within that class, then we think it is clear that the act does not fall within the constitutional inhibition, because of its operation on one class only."

21. (1910) 232 Mo. 77, 92, 133 S. W. 8.

22. (1914) 258 Mo. 541, 167 S. W. 1008.

upon the authority of *State ex rel Atty. Gen. v. Miller* which was quoted from at length. Other recent cases have clearly recognized this principle.²³ It is, then, in the words of the court in *State ex inf. Barker v. Southern*,²⁴ essential "that the classification made by the Legislature shall rest on a reasonable basis and not upon a mere arbitrary division made only for the purpose of legislation."

The legislature has a large discretion in determining what is necessary classification. As was said in *Hawkins v. Smith*²⁵ it "is not required to trace with a hair line precision the boundaries of the class to which the resulting enactment shall apply." Since it must be established beyond any reasonable doubt that an act violates the constitution before the courts will declare it unconstitutional,²⁶ it should clearly appear that a classification is arbitrary and could not reasonably have been based upon a difference which bore a substantial relation to the object sought to be attained by the statute.²⁷ A statute, however, need not include all possible members of a class if it embraces within its scope all such things as ordinarily are included in the classification.²⁸

The problem of classification under the prohibition of local and special legislation is similar to the problem of classification under the provision in the Constitution of the United States securing equal protection of the laws to all persons within the jurisdiction of the state; and it is believed that the same principles of classification which have been adopted by the Supreme Court of the United States in reference to this provision in the federal con-

23. *Hawkins v. Smith* (1912) 242 Mo. 678, 147 S. W. 1042; *State ex inf. Barker v. Southern* (1915) 265 Mo. 275, 177 S. W. 640; *State ex rel Waterworth v. Clark* (1918) 275 Mo. 95, 204 S. W. 1090, 1092.

24. (1915) 265 Mo. 275, 286, 177 S. W. 640.

25. (1912) 242 Mo. 688, 696, 147 S. W. 1042.

26. *State ex inf. Barker v. Southern* (1915) 265 Mo. 275, 284, 177 S. W. 640.

27. *Hawkins v. Smith* (1912) 242 Mo. 688, 147 S. W. 1042. In this case the court said in upholding a law applying to miners working underground (loc. cit. p. 695) "The difference between the situation of those engaged above and those underground patently 'bears a reasonable and just relation to the act in respect to which the classification is proposed' and this is all that is required. (*Gulf C. & S. F. R. Co. v. Ellis* 165 U. S. 150; *Bradford Construction Co. v. Heflin*, 88 Miss. 314)."

28. *State v. Gritner* (1896) 134 Mo. 512, 528, 36 S. W. 39.

stitution are applicable in determining the validity of state legislation under the provision against local and special laws in state constitutions. There are, however, differences to be noted between the two provisions. A local law is not objectionable under the federal constitution,²⁹ while it is prohibited under the state constitution. Neither does the "equal protection" clause forbid the granting of special privileges by a special law.³⁰ The federal provision "means that no persons or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances."³¹ The prohibition against special and local laws is much more comprehensive than the requirement that all persons subject to the jurisdiction shall have equal protection of the laws. It is suggested that perhaps the Supreme Court of Missouri in *State ex rel Johnson v. C. B. & Q. Ry.*³² confused the distinction between these two limitations when it declared a constitutional amendment void under the Fourteenth Amendment of the Constitution of the United States which provided for the collection of a road fund in all parts of the State except in St. Louis, Kansas City, and St. Joseph, because it did not apply to the cities named.³³ It is difficult to reconcile the reasoning in this case with the holding of the Supreme Court of the United States in *Missouri*

29. *Missouri v. Lewis* (1880) 101 U. S. 22.

30. *Slaughter House Cases* (1873) 16 Wall. 36.

31. *Hayes v. Missouri* (1887) 120 U. S. 68, loc. cit. 71, Mr. Justice Field in delivering the opinion of the court said: "The Fourteenth Amendment to the United States Constitution does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in liabilities imposed."

32. (1905) 195 Mo. 228, 93 S. W. 784.

33. In the course of the opinion Marshall, J., said (loc. cit. p. 245): "A law which attempted to authorize certain counties of the state to have one kind of county government, and prohibited other counties in the state from having the same kind of government, would not be a uniform or equal law, and would violate not only the constitution of the state but the fourteenth amendment to the Constitution of the United States."

It is suggested that the doctrine of this decision casts doubt upon the validity of those provisions in the Constitution of Missouri which provide for the powers and organization of city and county government in the City of St. Louis.

v. *Lewis*³⁴ in which was held valid under the Fourteenth Amendment an act of the Missouri Legislature providing for a different set of appellate courts in one part of the state from those provided in the rest of the state.

Other tests of a general law have been laid down at different times. In *State v. Julow*,³⁵ Sherwood, J., said a natural class of persons could not be split in two and different rules applied to each class. In another case the court held an act valid which included "all who are or who may come into like situations and circumstances."³⁶ These are but different statements of the same proposition.

The definition of a general law here adopted is as follows: a statute which relates to persons or things as a class, both in the present and in the future as long as the law operates, which class is based upon a difference which bears a reasonable relation to the act in respect to which the classification is proposed, is a general law, while a statute which relates to particular persons or things of a class, or to a class as it is constituted at a given time, without allowances for changes in the future during the operation of the law, or to a class which bears no reasonable relation to the statute in question is a special law. A local law is a special law in which the objects to which the act applies are units of local government.

(To be concluded next issue)

34. (1879) 101 U. S. 22. Compare with the quotation in the above note the statement of Mr. Justice Bradley in *Missouri v. Lewis*, 101 U. S. 22, loc. cit. 31: "We might go still further, and say with undoubted truth, that there is nothing in the constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws."

35. (1895) 129 Mo. 163, 177, 31 S. W. 781. See also *State v. Walsh* (1896) 136 Mo. 400, 406, 37 S. W. 1112; *State v. Thomas* (1896) 138 Mo. 95, 101, 39 S. W. 481.

36. *Hawkins v. Smith* (1912) 242 Mo. 688, 695, 147 S. W. 1042.

LAW SERIES

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JUNE, NINETEEN HUNDRED AND TWENTY

NOTES ON RECENT MISSOURI CASES

CONTRACTS—"MERGER" OF CONTRACT TO CONVEY REAL ESTATE IN DEED. *Barger v. Healy*.¹—This was an action to compel specific performance of defendant's written contract to convey certain parcels of real estate by warranty deeds. After the plaintiff had introduced in evidence the written contract providing for the delivery of general warranty deeds by defendant, he proved that when the time came for the defendant's performance by the giving of the deeds, the defendant sent to his agent quitclaims, reserving for himself the mineral rights in the land. The plaintiff objected to the form of the deeds and requested general warranties as was provided in the contract. These the defendant refused to execute. The plaintiff, on the faith of his contract with the defendant, had contracted to sell the timber on the land to third parties. So, he finally took the quit claims and placed them on record notifying the defendant that he was taking them under protest and that he would hold defendant to strict compliance with the terms of the written contract. The trial court found for the plaintiff and entered a decree for specific performance of the contract

1. (1918) 276 Mo. 145, 207 S. W. 499.

to convey by warranty. In the Supreme Court the judgment was reversed and the petition ordered dismissed,—Faris, Blair and Williams, JJ. dissenting.

The majority of the court reached a result adverse to the plaintiff on the theory that the entire transaction was "merged" in the deeds which bespoke the final agreement, and whatever rights plaintiff had must be found in the deeds. The general statement is made that executory contracts to convey land are merged in subsequently executed deeds which have been delivered to and accepted by the purchasers.² It is said: "The rule applicable to all contracts, that prior stipulations are merged in the final and formal contracts executed by the parties, applies of course to a deed based upon a contract to convey. When a deed is delivered and accepted as a performance of a contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, still the deed must be looked to alone to determine the rights of the parties."³ One theory would deny an action on the contract on the ground that it has been superseded by a subsequently single written memorial, i. e. the deed; another takes the view that the deed has been accepted as performance of the vendors contract and hence no action can be maintained on that contract. In *French v. McMillion*⁴ the court stated that the equitable estate which the purchaser had by virtue of his contract became merged in the legal estate which he secured by virtue of the deed.

It is important to know the basis of this so called merger if proper distinctions are to be made in its application. That the deed is not a subsequent contract seems apparent; the deed is tendered in *performance* of an obligation created by the contract. It may be that the contract requires something additional to the giving of the deed, as for example a conveyance plus a money consideration. Can it be contended that after the deed is given the contract is discharged so that no obligation to give money would still remain? It would seem, therefore, that it cannot be said that the contract to convey is merged in the deed in the same sense that prior or contemporaneous oral or written agreements are declared to be merged in an ultimate written contract under the so-called parol evidence rule.

The question actually before the court in the principal case upon analysis seems to be this: Has the purchaser by the acceptance of the deeds different in nature from the deeds called for by the contract, waived his right to the latter; has he accepted the deed tendered as full and complete performance by the vendor of his contract with reference to the giving of a deed?

2. 13 Cyc. 616.

3. 2 Devlin, Deeds (3rd ed.) 850 A.

4. (1917) 79 W. Va. 639, 91 S. E. 538.

One of the first Missouri cases in which it was contended that the doctrine of merger should be applied was that of *Minor v. Edwards*.⁵ In that case the purchaser had accepted without objection a deed from the vendor and had placed it on record. The purchase price was payable upon the execution of a deed conveying title in fee. This action was to recover the purchase price. The defendant proved the existence of the certain judgment liens at the time of the acceptance of the deed. The Supreme Court, throughout, treated the case from the view-point of waiver. It held that the burden of proving a waiver was on the vendor who was asserting it and sent the case back for re-trial on the theory that "if the jury believed from the evidence that Edwards (the purchaser) received the deed tendered him by Pau'sel's (the vendor) agent, without objection, and placed it on record with a knowledge at the time that such deed did not convey an unincumbered title, or if Edwards subsequently ascertained the existence of the incumbrances and did not within a reasonable time thereafter make any objection to the defective title, such acts are an acceptance of such defective title in lieu of the one his contract secured to him."

The court in *Matheny v. Stewart*⁶ stated that when a conveyance of real estate becomes complete the parties make and accept the conveyance therein as measuring the liability on the part of the grantor and the compensation awarded the grantee in case of breach, and that the contract becomes merged in the deed and the remedy for losses when sought in its covenants must be confined to such as they give. Inasmuch as the action in this case was one for breach of a covenant contained in the deed, it cannot be regarded as an authority for the proposition involved in *Barger v. Healy*.

In *Wheeler v. Ball*⁷ there was an unequivocal acceptance of the deed tendered to the purchaser and there was nothing in the case to indicate that the deed tendered was not in full compliance of the contract. It is in fact suggested by the court that the plaintiff might successfully bring an action on the covenant in the deed.

The Kansas City Court of Appeals in *Wilson v. Wilson*⁸ refused to apply the rule of merger to the facts in the case before it. But Johnston, J., said: "The acceptance of the deed completes the execution of the contract, and, save in excepted cases the accepted deed is the final conclusive evidence of the real contract made by the parties, and all prior verbal or written agreements are extinguished by it, not however on account of any peculiar sanctity inhering in a deed, but because it is the last written expression of their agreement made by the parties." Such a

5. (1848) 12 Mo. 137.

6. (1891) 108 Mo. 73, 17 S. W. 1014.

7. (1887) 26 Mo. App. 443.

8. (1906) 115 Mo. App. 641, 92 S. W.

145.

view results, it seems, from a confusion of the contract itself with the performance of the contract by one of the parties. In *Smyth v. Boroff*,⁹ there was an acceptance of a general warranty deed. It was held that after such acceptance the plaintiff could not recover for a breach of a stipulation in the contract to convey by good and proper conveyance. Inasmuch as the plaintiff received a general warranty deed, a good and proper conveyance, it is difficult to see where there was any breach of the stipulation. In a very recent case¹⁰ the Kansas City Court of Appeals held that the plaintiff, after accepting a warranty deed from a third person in lieu of one from the vendor, and after acknowledging in writing that he accepted such deed as performance of the vendor's contract, could not recover on the contract in an action against the vendor.

All of the Missouri cases cited above with the exception of *Frisbie v. Scott* were cited by the Supreme Court in arriving at the result in the case under discussion. An analysis of these cases seems to reveal the absence of factors present in *Barger v. Healy*. In none of those cases did the purchaser by any acts or statements indicate any objection to the performance tendered by the vendor; yet in one case,¹¹ even though there was no objection made by the vendee, the court put the burden of showing a waiver in fact on the vendor.

Two cases squarely in point from other jurisdictions are *Bull v. Willard*¹² and *Porter v. Cook*.¹³ In both cases there was an acceptance by the purchaser of deeds inferior to the ones called for by the contract, an acceptance under protest. In the former it was held by the Supreme Court of New York that an acceptance of a deed, even though under protest, as a matter of law, precluded the purchaser from insisting on a further compliance. The Wisconsin court in *Porter v. Cook*, *supra*, admits the possibility of a situation in which the vendor might have given the deed and the purchaser accepted it with the understanding that it was given and accepted subject to the adjustment of the disputed rights. In such a case the court indicated that the presence or absence of a waiver of the performance required by the contract would be a question of fact. The court construed the tender of the deed by the vendor as an offer which had to be accepted like any contractual offer, unconditionally. Such a construction of an attempted or partial performance of a contract as an offer seems open to criticism.

There are numerous authorities which support the general proposition that the contract to convey is merged in a subsequently accepted conveyance.¹⁴ Upon analysis these decisions will be found to have dealt with

9. (1911) 156 Mo. App. 18, 135 S. W. 973.

10. *Frisbie v. Scott* (1918) 199 Mo. App. 131, 201 S. W. 561.

11. *Minor v. Edwards*, Note 5, *supra*.

12. (1850) 9 Barb. 641.

13. (1902) 114 Wis. 60, 89 N. W. 823.

14. *Carter v. Beck* (1867) 40 Ala. 599; *Bryan v. Swain* (1880) 56 Cal. 616; *Enos v. Anderson* (1907) 40 Colo. 395,

situations in which the purchaser's acceptance was clean-cut and unambiguous.

In *Slocum v. Bracy*,¹⁵ cited by Woodson, J., in the principal case, the actual decision was to the effect that the evidence conclusively showed an acceptance by the purchaser. But the language of the opinion indicates that the court was basing its decision upon the fact that the purchaser had, as a matter of *fact*, waived the performance required by the contract. The court points out a very clear distinction between merely accepting the instrument as a conveyance and accepting it as performance of a contract. That the situation, conduct and intentions of the parties at the time the deed is accepted, are all factors to be weighed in determining the existence of a waiver, is the rule formulated in *Kansas*.¹⁶

In a Massachusetts case¹⁷ the defendant contended that the plaintiff by accepting a deed without objection had waived his right to the deed called for by the contract. Said the court: "We think that a waiver is not conclusively shown as a matter of law. It is to be noted that the waiver set up is not of a condition precedent, or of the time or place of the performance of a contract. If it can be called a waiver at all it is a waiver of the right to require the conveyance of all the estate which the defendant had agreed to convey. It is true that the plaintiff took the deed with the knowledge that it did not convey all that he was entitled to receive, but whether he took it as a full and satisfactory performance of the contract, or as only partial performance reserving the right to insist upon damages as to the part not performed, was a question of intention; and the burden¹⁸ of showing the waiver was on the defendant."¹⁹

93 Pac. 475; *Brewer v. Mueller* (1912) 254 Ill., 315, 98 N. E. 548; *Essex v. Hopkins* (1912) 50 Ind. App. 316, 98 N. E. 307; *Creechmore v. Bryant* (1914) 158 Ky. 166, 164 S. W. 337; *Lawson v. Mullins* (1906) 104 Md. 156, 64 Atl. 938; *Clifton v. Jackson* (1889) 74 Mich. 183, 41 N. W. 891; *Re Brown's Estate* (1914) 126 Minn. 359, 148 N. W. 121; *Mathews v. Emdin* (1915) 93 Atl. 881 (N. J.); *Norment v. Turley* (1918) 174 Pac. 999 (N. M.); *Cathedral Court Co. v. Sun Construction Co.* (1911) 72 Misc. Rep. 408, 130 N. Y. S. 154; *Farrant v. Troutman* (1914) 42 Okl. 418, 141 Pac. 776; *Manley v. Noblitt* (1915) 180 S. W. 1154 (Tex.); *Knight v. Southern Pac.* (1918) 172 Pac. 689 (Utah); *Investment Co. v. Foundry* (1910) 59 Wash. 601, 110 Pac. 417; *William James Sons Co. v. Hutchinson* (1916) 79 W. Va. 389, 90 S. W. 1047; *Oliver Refining Co. v.*

Portsmouth Oil Refining Co. (1909) 109 Va. 513, 64 S. E. 56.

15. (1893) 55 Minn. 249, 56 N. W. 826.

16. *Loftus v. Reed* (1910) 82 Kan. 485, 108 Pac. 850. See note to this case in 31 L. R. A. (N. S.) 457.

17. *Sessa v. Arthur* (1903) 183 Mass. 230, 60 N. E. 804.

18. As to presumptions arising from the acceptance of a deed and burden of proof see *Slocum v. Bracy*, note 15, supra, and *Houghtaling v. Lewis*, 10 Johns. 297, (N. Y.), also note in 31 L. R. A. (N. S.) 457.

19. See also: *White v. Murray* (1914) 218 Fed. 933 (D. C.); *Thordson v. Kruse* (1915) 173 Iowa 268, 155 N. W. 334; *Taylor v. Railway Co.* (1911) 27 S. D. 528, 132 N. W. 152; *Davis v. Lee* (1909) 52 Wash. 330, 100 Pac. 752.

Barger v. Healy, the principal case, involved the right of the promisee of a contract to convey to accept a partial performance and reserve a right to insist upon a complete performance. The existence of such right should be determined, it is believed, independently of any fiction—and the term merger seems nothing more than a legal fiction—which beclouds the real issue presented. It is the well settled rule of law in this state that before a waiver will arise there must be the intent to waive.²⁰ The trial court by its finding for the plaintiff must have found that as a matter of fact the plaintiff did not accept the quit-claim deeds as full and satisfactory performance of the defendant's obligation under the contract. Under the holding and language of *Minor v. Edwards* the Supreme Court, it is submitted, might have reached what seems a more desirable result than that attained under the theory of the merger of contract in the conveyance as a matter of law. The court should not be zealous in its protection of one who in violating his contract may say to the other party to the contract, "you take what I want to give, or nothing." If the performance called for by the defendant's contract involved the transfer of something other than a deed, as for example, a chattel, it is not believed that the court would have been concerned with the question of merger. The fact that a written solemn instrument is the means by which title is to be transferred should not affect the solution of what seems the real problem involved, to-wit: The waiver by the purchaser of his right to the performance for which he contracted.²¹

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Kansas City, Mo.

APPEAL AND ERROR—REMAND—LIMITATION OF NEW TRIAL. *Schroeder v. Edwards et al.*¹—Has an appellate court the power to remand a case for a new trial upon a single issue,² leaving the verdict upon the remaining issue to stand?

It has been said that this power did not exist at common law.³

20. *Burke v. Murphy* (1918) 275 Mo. 397 1. c. 411, 205 S. W. 32; *Hays v. Manning* (1914) 263 Mo. 1, 172 S. W. 897.

21. Under the ruling of the principal case the plaintiff is evidently without remedy at law as well as in equity; this note has not dealt with any possible distinction between an action for specific performance and one for damages for breach of contract.

22. Mr. Liberman is a graduate of the School of Law, University of Missouri,

and a member of the Kansas City, Missouri, Bar.—Ed.

1. (1918) 205 S. W. 47.

2. Issue is here used in the sense of an issue of fact, arising generally in a single count, and not in the sense of separate count. The loose use of the term has caused some confusion in the cases. *Lavelle v. Corrignio* (1895) 33 N. Y. Supp. 1. c. 380.

3. 33 Harvard Law Review 249; *Parker v. Godin* (1729) 2 Str. 813.

Smith, C. J., in *Yasoo & M. V. R. Co. v. Scott*,⁴ after a careful examination of the English authorities, reports no case allowing a partial new trial prior to 1700. However, the objection that the verdict was indivisible seems to have been overcome in later English cases,⁵ and that procedure has been allowed. The question has been definitely settled in England by a rule of court: "A new trial may be ordered on any question without interfering with the finding or decision upon any other question."⁶

In this country, by the weight of authority, a new trial of a single issue may be granted.⁷ This in some jurisdictions has been by statute,⁸ in others it has been thru court decisions.⁹ In the leading case of *Lisbon v. Lyman*,¹⁰ Doe, J., justified this innovation on the ground that the appellant is entitled, not to a new trial but to a correction of the error. The correction is the end, the new trial is the means, and if the error was such that it could be corrected without prejudice by the retrial of a single issue, leaving intact those properly adjudicated, he deemed it just and expedient to do so.

The basis of the contrary rule is expressed in *Cerney v. Paston & G. Co.*¹¹ where, after refusing a new trial on the single issue of damages and commenting on the above case, the court said: ". . . . until the nature of the trial by jury is modified, and the character of their verdict is essentially altered, we doubt the beneficent effect of any attempt of the courts to by construction change the law so as to split the verdict of the jury into component parts, and try the several issues by different juries." In short, the argument is that the *amount* of damages may be the result of a compromise between the jurors who favored larger damages and those who desired a verdict for the defendant.¹² This reasoning has been extended to issues other than damages, the emphasis being laid on the "omnibus" character of the verdict.

The point at variance between the opposed decisions is whether a single issue may be separated *without prejudice* for retrial. The technical objections of the English common law judges should have no force in this country.¹³

Missouri courts when there are several counts have frequently reversed the judgment and remanded a cause for a retrial on a single

4. (1915) 108 Miss. 871, 67 So. 491, L. R. A. 1915 E. 239.

5. *Thawites v. Swainsbury* (1831) 7 Bing. 437; *Yasoo & M. V. R. Co. v. Scott*, *supra*, and cases there cited.

6. *The Annual Practice* (1915) p. 713.

7. L. R. A. 1915 E. 240 and authorities there collected. 4 C. J. p. 1194.

8. Ga. Code, 1895, Sec. 5498. *Mass. Gen. St. c. 112, Sec. 11, 2 Rev. Laws c. 156, Sec. 11. U. S. Rev. St. Sec. 701, 4 Fed. St. Ann. 458.*

9. In *Hill v. Am. Surety Co.* (1900) 107 Wis. 34, the court seems uncertain whether this can be attributed to a constitutional devolution of appellate jurisdiction, or to the general supervising control of superior over inferior courts.

10. (1870) 49 N. H. 553, 1 c. 600.

11. (1908) 83 Neb. 88, 119 N. W. 14.

12. See *Simmons v. Fish* (1912) 210 *Mass. 563, 97 N. E. 102.*

13. L. R. A. 1915E, 247.

count, where the error affected that count alone, leaving the judgment as to other counts to stand.¹⁴ Similarly a judgment has been affirmed as to one defendant and reversed as to another.¹⁵ This does not appear anomalous or radical in view of the statute¹⁶ which allows the trial court, in its discretion, to order separate trial of different *causes of action* united in the same petition.¹⁷

The case of *Schroeder v. Edwards*,¹⁸ was an attempt by creditors of an Illinois corporation to subject amounts unpaid on capital stock to their claims. Their judgments against the corporation were obtained in the State of Illinois by confession, the clerk entering the judgments during vacation. No proof of a statute authorizing this was made and the case was remanded for a trial upon this issue or question alone. At the second trial the appellant sought to introduce evidence upon other issues but he was denied this privilege. After a second appeal division number two of the Supreme Court through Roy, C.,¹⁹ said that the Supreme Court had "undoubted right" to limit a new trial to a single issue. This was an equity case in one count and the issue was one of fact decisive of the whole cause.

Two cases, *McLure v. Bank of Commerce*²⁰ and *Butler Co. v. Boatmen's Bank*,²¹ were cited by Roy, C. *Butler Co. v. Boatmen's Bank* was twice before the Supreme Court.²² A comparison of the decision upon the first appeal with the decision upon the second appeal discloses that the court did not hold that there may be a new trial as to a single issue. The *McLure* case, *supra*, was in point.

The Supreme Court in *Third National Bank v. Owens*,²³ in reversing the judgment and remanding the cause for an error of the trial court in striking out the defense of fraud, confined the next trial to that issue

14. *Willis A. Roberts v. Central Lead Co.* (1902) 95 Mo. A. 581, 69 S. W. 630; *Sparks v. Dispatch Transfer Co.* (1891) 104 Mo. l. c. 548, 15 S. W. 417.

15. *Westcott v. Bridwell* (1867) 40 Mo. 147, l. c. 148.

16. Sec. 1971 R. S. Mo. 1909: "Where there are several causes of action united in a petition, or where there are several issues, and the court shall be of the opinion that all or any of them should be tried separately by the court or jury, it may, on the application of either party, direct separate trials, which may be had at the same or at different terms of the court, as circumstances may require. In all cases where there are separate causes of action united as aforesaid, the court shall award separate costs against the unsuccessful par-

ty, unless for good cause it shall otherwise order. The judgment upon each separate finding shall await the trial of all the issues."

17. Note that the statute reads "several causes of action united in a petition, or where there are several issues." But it would appear from *Needles v. Burk* (1889) 98 Mo. l. c. 476, that *issues* has been considered as synonymous with *cause of action*.

18. (1916) 267 Mo. 459, 184 S. W. 108.

19. (1918) 205 S. W. 47.

20. (1913) 252 Mo. 510, 160 S. W. 1005.

21. (1901) 165 Mo. 456, 65 S. W. 715.

22. (1897) 143 Mo. 13.

23. (1890) 101 Mo. 558, l. c. 585, 14 S. W. 632.

alone. The suit was one against sureties on a bankteller's bond and a referee had made a finding of the facts.

In *Chandler v. R. R.*²⁴ the judgment was reversed on the ground that the widow of the deceased had not established her right under the statute to sue. Lamm, J., in refusing to confine the subsequent trial to that issue alone, said: "In equity where the issues rest with the chancellor, and a jury fills no office of substance, the course is sensible where occasion demands . . . but in a case at law triable to a jury, to send the case below on one question of fact to be tried out before another jury, leaving other issues of fact foreclosed by a former verdict, is contrary to our statutory scheme for jury trials. . . ." No authorities are cited for the latter proposition.

This decision denying the practice in actions at law because *contrary to the statutory scheme of jury trials* is reconcilable with *Third National Bank v. Owens*, *supra*. There the facts were found by a referee.²⁵ Another trial upon a single point, had been granted in several prior *equity* cases.²⁶

However, in 1894 the St. Louis Court of Appeals in an action against the sureties on a builder's bond, granted a new trial as to the sole issue whether when they signed the bond the sureties knew that it referred to the contract in question.²⁷

The reasoning of Lamm, J., is similar to that of the Nebraska court in *Cerney v. Paxton & G. Co.*, *supra*, *eg.*, due to the "omnibus" character of a jury's verdict the single issue could not be retried *without prejudice*. The decision in the Chandler case, *supra*, is of binding force only as to the facts in that case. It must be confessed, however, that it was entirely practicable to retry that case on the single issue in question, viz.: whether there were minor children in whom the cause of action rested.

It would seem that in accord with the weight of authority the Supreme Court should even in an action at law, limit the subsequent trial to a single issue, whenever it appeared that it was practicable to do so. It is a somewhat chimerical fear that no issue may be separated without prejudice. In the words of Doe, J., it is to be remembered that the appellee has rights as well as the appellant. In no case found has a distinction been taken between the right of an appellate and trial court to exercise this power.²⁸

24. (1913) 251 Mo. 592, 1. c. 602, 158 S. W. 35.

25. *Hill v. American Surety Co.* (1900) 107 Wis., 1. c. 34, 82 N. W. 691. Wisconsin seems to draw a similar distinction between actions in law and in equity, basing it upon the inability of the appellate court to decide questions of fact in the former case.

26. *Leeper v. Taylor* (1892) 111 Mo. 1. c., 326, 19 S. W. 955; *McLure v. National Bank of Commerce* (1913) 252 Mo. 510, 1. c. 524, 160 S. W. 1005; *Chouteau v. Allen* (1879) 70 Mo. 290 1. c. 344.

27. *Oberbeck v. Mayer* (1894) 59 Mo. App. 1. c. 298.

28. L. R. A. 1915E, 258 and authorities there collected.

It is submitted that within the sound discretion of the court the power in legal or equitable actions to direct the retrial of a single issue, without disturbing those properly tried, is a salutary one, saving time, money, and needless litigation, and should be encouraged.

J. A. W.

JUSTICES OF THE PEACE—SUFFICIENCY OF APPEAL NOTICE FROM JUSTICE COURT—*Davenport Vinegar & Pickling Works v. Shelley*.¹—On October 26, 1909, judgment for \$203.90 was obtained before a justice of the peace in St. Louis. The defendant filed a counter-claim on the day of the trial and judgment on the counter-claim was for plaintiff.

A notice of appeal was served on plaintiff's attorneys who signed an acknowledgment of "due and timely service of within notice."

The notice set out the date of judgment as Oct. 21, instead of Oct. 26, the amount as \$203.62 instead of \$203.90 and omitted any mention of the counter-claim.

Plaintiff's attorneys appeared in the circuit court "for the purpose of the motion only" and moved to affirm the judgment on the ground that appellant failed to serve appellee with notice of appeal as required by section 4074 R. S. Mo. 1899, referring in the motion to the "so-called notice" mentioned above and setting it out in full.

After various vicissitudes the case was finally certified to the Supreme Court by Allen, J., dissenting from the opinion of the St. Louis Court of Appeals affirming the judgment for want of a proper notice of appeal.

The Supreme Court, speaking thru White, C., applied a rule of liberal construction to section 7582 R. S. Mo. 1909* (which is section 4074 R. S. Mo. 1899) and held the notice sufficient. The court, in its opinion, mentioned the fact that the attorneys for plaintiff in effect admitted, by their inclusion of the "so-called notice" in their motion to affirm, that notice was served in and referred to the particular case.

The opinion noticed many of the opinions of the courts of appeals in which a rule of strict construction had been applied. But that attitude had not always been present, and thus a lack of certainty as to what constitutes notice was evident and possibly this was reflected by the delay in the disposition of the case in the circuit court.

1. (1920) 217 S. W. 267.

2. Sec. 7582 R. S. Mo. 1909, reading "If the appeal be not allowed on the same day on which the judgment is rendered, the appellant shall serve the appellee, at least ten days before the first day of the term at which the cause is to be determined, with a notice in writing stating the fact that an appeal has been taken from the judgment therein speci-

fied. The notice may be served in like manner as on original writ or summons, or by delivering a copy of the same to appellee by any person competent to be sworn as a witness, or if appellee shall have appeared to the suit before the justice, either by agent or attorney, said notice may be served on said agent or attorney; . . . (R. S. 1899, sec. 4074)."

Where the judgment was against two persons and the notice of appeal named but one of them, following his name with "et al.," it had been held insufficient.³ And where default judgment was obtained against J. J. Taylor and the notice of appeal was in the name of C. C. Taylor, it had also been held insufficient.⁴ The same was true of one signed J. Henry Baer when judgment recited that it was rendered against Henry Baer.⁵ But notice of appeal to plaintiff as "J. W. Teasdale" when judgment was rendered for "J. W. Teasdale and Co., a corporation" had been held sufficient.⁶ Where there is error in stating in the notice the date the judgment was rendered, it has been held both sufficient⁷ and insufficient notice.⁸ But an omission to state any date, the notice otherwise being complete, did not make the notice insufficient.⁹

As said by White, C., in his opinion, most of the decisions giving a strict construction claim support from *Tiffin v. Millington*.¹⁰ Appellant Tiffin in that case was a garnishee against whom judgment was rendered by a justice of the peace. As defendant he had notice of appeal served on respondent by having the notice read to the latter by a deputy constable. The statute¹¹ provided for notice in writing to appellee and the court held that reading the notice to appellee was not sufficient, citing "a late case decided at Fayette" ¹² as a former direct ruling. The court also said that had the notice been given in writing, it would not have been good as "it is obviously a notice which does not describe the cause, and belongs properly to some other suit between the parties."

It is submitted that that dictum is not a proper basis for the strictness in construing the statute on this subject, as shown in the cases referred to and that the Supreme Court has done an excellent thing in holding that a notice which notifies is sufficient and that extrinsic facts may be considered to discover whether the notice of appeal was actual notice that an appeal had been taken from the judgment in question.

3. *State v. Hammond* (1902) 92 Mo. App. 231.

4. *McGinnis etc. Hdw. Co. v. Taylor* (1886) 22 Mo. App. 513.

5. *Stone v. Baer* (1900) 82 Mo. App. 399.

6. *Teasdale v. American Fruit, etc. Co.* (1906) 120 Mo. App. 584, 97 S. W. 655.

7. *Collier v. Langan, etc. Co.* (1907) 128 Mo. App. 113, 106 S. W. 593.

8. *Hammond v. Kroff* (1889) 36 Mo. App. 118; *Cooper v. Northern etc. Co.* (1906) 117 Mo. App. 423, 93 S. W. 871; *Clay v. Turner* (1909) 135 Mo. App. 596, 116 S. W. 480.

9. *Holschen Coal Co. v. Missouri etc. Ry. Co.* (1892) 48 Mo. App. 587; *Mun-*

roe v. Harrington (1902) 99 Mo. App. 288, 73 S. W. 221.

10. (1834) 3 Mo. 419. The notice read as follows: "Mr. Jeremiah Millington take notice that I have taken an appeal to the next term of the Circuit of St. Louis County, from a judgment rendered against me by Patrick Walsh in a suit wherein you was plaintiff and I was defendant Clayton Tiffin, Nov. 12, 1832." (Italics ours, Ed.)

11. p. 481 Rev. Code, 1825.

12. Probably *Newberry v. Melton* (1832) 3 Mo. 121, a case in the Fayette district, one and one half years before, decided exactly on that point by the same judge, Hon. Robert Wash.

This is the position taken in several other states¹³ having like statute and would seem to be much the better position in view of the professed simplicity of the procedure before justices of the peace and the desirability of keeping matters of practice as simple as is possible.

B. W.

GARNISHMENT—BONA FIDE CREDITOR AS GARNISHEE. *Leonard et al v. Martin, Shannon County Bank et al, Garnishees.*¹—The Shannon County Bank had a bona fide debt due it from Martin. An agent of the Bank induced Martin to purchase cattle from the plaintiffs giving in payment checks on the Shannon County Bank in which Martin had no deposit. The same agent also assisted Martin in selling the cattle and the proceeds of the sale were turned over to the bank and applied on the payment of Martin's debt to the bank. The worthless checks given in payment for the cattle were not honored and plaintiffs brought an action against Martin for the purchase price.

An attachment was issued against the property of Martin and the bank was garnished. In answer to interrogatories the garnishee denied having any property of Martin or being indebted to him for any sum whatever. The trial court decided that the issue between plaintiffs and the bank could not be tried in a garnishment proceeding. The Springfield Court of Appeals² and the Supreme Court reversed the judgment and remanded the cause for a new trial, holding that the bank was subject to garnishment.

The Supreme Court adopted the decision of the Court of Appeals which relied on *National Tube Works Co. v. Machine Co.*,³ *Kurtz v. Troll*,⁴ and *Aull v. Gaffin*⁵ for the principle that "the law will not permit a creditor to hold that which he has applied on his bona fide indebtedness where it has been procured thru a fraud practiced by such creditor and the debtor on the other creditors." In *Aull v. Gaffin*, *supra*, the conveyance involved was from a husband to his wife to whom the court held he owed no debts. In *Kurtz v. Troll*, *supra*, the conveyance in question was to a voluntary purchaser with knowledge that the debtor intended to defraud

13. *Burrows v. Norton* (1874) 2 Hun. (N. Y.) 55; *Friemark v. Rosenkranz* (1892) 81 Wis. 359, 51 N. W. 557; *Noall v. Halonen* (1893) 84 Wis. 402, 34 N. W. 729; *Hills v. Mills* (1861) 13 Wis. *625; *Hender v. Ring* (1895) 90 Wis. 358, 63 N. W. 282; *Cowles v. Neillville* (1909) 37 Wis. 384, 119 N. W. 91; *Kirkpatrick v. Dakota Central Ry. Co.* (1887) 4 Dak. 481, 33 N. W. 103; *Haag v. Burns* (1908) 22 S. D. 51, 115 N. W. 104; *State ex rel v. Superior Ct. of Spokane County, et al*

(1893) 7 Wash. 223, 34 Pac. 922; *Rutledge v. Superior Ct.* (1885) 65 Cal. 85, 7 Pac. 144. *Contra, State ex rel v. District Court et al* (1910) 41 Mont. 100, 108 Pac. 580.

1. (1919) 214 S. W. 968.
2. (1915) 192 Mo. App. 350, 180 S. W. 1014.
3. (1893) 118 Mo. 365, 22 S. W. 947.
4. (1903) 175 Mo. 506, 75 S. W. 386.
5. (1911) 234 Mo. 171, 136 S. W. 343.

his creditors. In *National Tube Works Co. v. Machine Co.*, *supra*, the conveyance was to a creditor who accepted assets of a corporation in payment of debts due him by the corporation, and also in payment of debts due him by an officer of the corporation as an individual. Conceding that any principle of law deducible from those cases would apply to a case where a creditor accepts only the amount of his just debt, it does not follow that because a creditor will not be permitted to hold that which he procures by a fraud practiced by himself and his debtor upon other creditors that garnishment is a proper remedy.

The Missouri statute on garnishment provides that all persons shall be subject to garnishment who have in their possession goods, moneys or effects of defendant, and all who are debtors of the defendant.⁶ This statute is essentially legal and not equitable in its nature and procedure.⁷ Therefore, to try the issue between the Shannon County Bank and the plaintiffs in a garnishment proceeding it is necessary to hold that the conveyance of the proceeds of the sale from Martin to the bank did not pass title but that the proceeds are still the property of Martin.

The court referred to *Pile v. Bank of Flemington*,⁸ where with facts somewhat similar to those of the principal case the defrauded creditor brought an action directly against the defrauding creditor *for money had and received*. Whereupon the court declared: "We can see no reason why that the money in our case (so far as these plaintiffs are concerned) cannot be treated as yet belonging to Martin, as to which a garnishment would avail." It is submitted that in the former case the conveyance by the debtor to the defrauding creditor is treated as passing title to the property. But in the principal case the conveyance was treated as not passing the title, and in so far as *Pile v. Bank of Flemington* has any bearing on this case it is against the result reached.

Nevertheless the result reached by this decision seems to be a desirable one and is in line with decisions in some other states.⁹ It can be justified by viewing the conveyance of the proceeds of the sale by Martin to the bank as one made to hinder, delay, and defraud creditors and hence void as to them under Sec. 2881, R. S. Mo. 1909.

Hitherto in Missouri the conveyances to bona fide creditors which have been held void as to other creditors have been those in which the bona fide creditor accepted more in money or in money's worth than his

6. Sec. 2413 R. S. Mo. 1909: "All persons shall be subject to garnishment on attachment or execution, who are named as garnishees in the writ, or have in their possession goods, moneys or effects of the defendant not actually seized by the officer, and all debtors of the defendant, and such others as the plaintiff or his attorney shall direct to be sum-

moned as garnishees. (R. S. 1899 Sec. 3433)."

7. *Lackland v. Goresche* (1874) 56 Mo. 267.

8. (1915) 187 Mo. App. 61, 173 S. W. 50.

9. *Hill et al v. Mallory* (1897) 112 Mich. 387, 70 N. W. 1016; *Thompson v. Furr* (1879) 57 Miss. 478.

just debt, thus aiding the debtor to conceal his assets from other creditors.¹⁰ And in *Bangs Milling Co. v. Burns*¹¹ it was said arguendo that so long as a creditor accepted only the amount of his just debt, the fact that he aided his debtor in defrauding his other creditors did not render void the conveyance from his debtor to him. The court referred to these remarks but declined to be bound thereby.

It is submitted that the decision in *Leonard et al v. Martin* inaugurates a new class of conveyances which are void as to creditors under Sec. 2811 R. S. Mo. 1909.

R. E. MURRAY¹²

HUSBAND AND WIFE—POWER OF A WIFE TO DISPOSE OF HER PROPERTY—*Headington v. Woodward*.¹—The Supreme Court has announced the rule that if a wife secretly, with intent to defraud her husband out of his marital rights in her property, conveys away her property without consideration and retains the beneficial interest in it during her life time equity will treat it as a fraud upon his marital rights conferred by Sec. 350 R. S. Mo. 1909.²

The facts were: A, without the knowledge of her husband, as gifts executed and delivered deeds to two parcels of real estate to two nephews. By virtue of the request of A the deeds were not recorded until after her death. During her life she retained possession of the property, paid the taxes and collected the rents. Previous to the execution of the deeds she had executed a will devising to her husband one-half of all the property she owned. No children had been born to the marriage. If the two deeds were a valid disposal of her property the husband in reality would receive nothing as this constituted practically all of her property.

The decision represents an additional step in the application of equitable principles. It was early established that a husband could not convey away his property before marriage for the purpose of preventing the

10. *McVeagh v. Baxter* (1884) 82 Mo. 518; *State ex rel Robertson v. Hope* (1890) 102 Mo. 410, 14 S. W. 985; *National Tube Works Co. v. Machine Co.* (1893) 118 Mo. 365, 22 S. W. 947; *Bank v. Fry* (1908) 215 Mo. 24, 115 S. W. 439; *Bank v. Montgomery* (1917) 192 S. W. 941; *McNichols v. Richter* (1883) 13 Mo. App. 515; *Meysenburg v. Distilling Co.* (1885) 20 Mo. App. 21; *Hanna v. Finley* (1889) 33 Mo. App. 645; *Meyberg v. Jacobs* (1890) 40 Mo. App. 128; *Ball v. O'Neill* (1896) 64 Mo. App. 388; *Grocery Co. v. Hudson* (1910) 147 Mo.

App. 31, 126 S. W. 511.

11. (1899) 152 Mo. 350, 53 S. W. 923.

12. Student, School of Law, University of Missouri.—Ed.

1. (1919) 214 S. W. 963.

2. Section 350 R. S. Mo. 1909. "When a wife shall die without any child or other descendants in being capable of inheriting, her widower shall be entitled to one half of the real and personal estate belonging to the wife at the time of her death, absolutely, subject to the payment of the wife's debts."

dower rights of his intended wife from attaching.³ This doctrine was likewise applied to the wife to prevent her from disposing of her property during the treaty of marriage in fraud of her intended husband's marital rights.⁴ The Supreme Court had also established the doctrine that a transfer of personal property made by the husband just before death would be set aside.⁵ The principal case extends the doctrine to conveyances of real property made by the wife during marriage even tho there be no children born of the marriage.

The "Twin Statutes" (Secs. 350-351 R. S. Mo. 1909) have been interpreted to confer upon husband and wife equal rights in each other's property.⁶ Thus, if the husband is denied the power to dispose of his property in fraud of his wife's marital rights the same rule must also be true of her. They are, however, on an equal basis only so far as the rights which they acquire under these two statutes are concerned.

Independent of Sec. 351, the wife is entitled to dower which is fundamentally different from the statutory interest to which the husband is entitled.⁷ She is entitled to a life estate in one-third of all the real property of which he may become seized during marriage. The right attaches immediately upon marriage and cannot be destroyed without her consent. It is in every respect a legal right.

The estate by curtesy acquired by the husband independent of the statute differs in extent and depends upon different conditions. The estate does not become initiate until the birth of a child capable of inheriting the property. It becomes consummate upon the death of the wife. He has by statute⁸ been deprived of the usufruct of the wife's land during her life and his curtesy is simply a life estate in her land upon her death.⁹

The statutory interest accruing to the husband differs from this in that upon her death he becomes the absolute owner, subject to her debts, of one-half of her property both real and personal. The common law curtesy does not come to him burdened with her debts.¹⁰

3. *Hach v. Rollins* (1900) 158 Mo. 182, 59 S. W. 232; *Donaldson v. Donaldson* (1913) 249 Mo. 1. c. 245, 155 S. W. 1; *Murray v. Murray* (1896) 115 Cal. 266, 47 Pac. 37; *Higgins v. Higgins* (1905) 219 Ill. 146, 76 N. E. 86; 13 R. C. L. 103.

4. *Hach v. Rollins* (1900) 158 Mo. 1. c. 187, 59 S. W. 232; *Kelley v. McGrath* (1881) 70 Ala. 75, 45 Am. Rep. 75; *Butler v. Butler* (1879) 21 Kansas 521, 30 Am. Rep. 441.

5. *Davis v. Davis* (1838) 5 Mo. 183; *Stone v. Stone* (1853) 18 Mo. 390: "If such a practice was allowed the efficacy

of the statute conferring dower in personalty, would depend on the whim or caprice of the husband."

6. *Spurlock v. Burnett* (1904) 183 Mo. 1. c. 531, 81 S. W. 1221; *Gilroy v. Brady* (1906) 195 Mo. 1. c. 209, 93 S. W. 279; *Waddle v. Frasier* (1912) 245 Mo. 1. c. 401, 151 S. W. 87.

7. Secs. 345 and 358 R. S. Mo. 1909.

8. Sec. 8309 R. S. Mo. 1909.

9. *Register v. Elder* (1910) 231 Mo. 321, 132 S. W. 699; *Myers v. Hansbrough* (1907) 202 Mo. 1. c. 500, 100 S. W. 1137.

10. *Myers v. Hansbrough* (1907) 202

Just what effect a wife's bona-fide conveyance of property, without the consent of the husband, will have upon his curtesy is perhaps not definitely settled. She can execute a deed which will effectually pass the title to her property,¹¹ but whether it will be subject to the possibility of her husband surviving and claiming his curtesy has recently been questioned. In discussing this question the Supreme Court said: "Whether a husband's curtesy in such property of his wife is more than an estate for life contingent upon her failure to sell is a question not definitely well settled."¹²

It has been held that the power to destroy this curtesy should be implied from the rights conferred upon the wife by the Married Women's Acts. This seems to be the weight of authority.¹³ Our Supreme Court has expressly held that such was not its force.¹⁴ In several cases the Supreme Court has used language, a fair interpretation of which would make the husband's curtesy contingent upon the wife's failure to dispose of her property in a bona fide manner.¹⁵ In *Teckenbrook v. McLaughlin* the Supreme Court did not definitely state that the wife could convey and bar her husband's curtesy right, but left the impression that possibly she could do so since the Married Women's Acts. In a case in the Kansas City Court of Appeals a wife had leased her property but it was held that the husband's curtesy was not affected because he did not join in the lease.¹⁶ This would seem clearly to indicate that the tendency in Missouri is to hold that curtesy cannot be destroyed without the husband's consent. The decision in *Ennis v. Eager*, *supra*, perhaps would have been different in a jurisdiction where the majority rule obtains as to the effect of the Married Women's Acts.

The dower and curtesy cases furnish an analogy bearing directly upon the nature of the right of each spouse under the twin statutes in the property of the other. Since the Married Women's Acts taking away from the husband the right to possession of the wife's freehold lands during marriage, the husband, where there are no children of the marriage, would have no marital rights in the wife's property either during marriage or after her death without the statute in question. This statute creates rights of the same nature as those created by the statute giving the wife "dower" in the husband's *personalty* previously alluded to.

The legislative intent was to create an additional *jus mariti* in each

Mo. 495, 100 S. W. 1137.

11. *Kirkpatrick v. Pease* (1907) 202 Mo. 1. c. 490, 101 S. W. 651.

12. *Teckenbrook v. McLaughlin* (1912) 246 Mo. 1. c. 717, 152 S. W. 38.

13. *Brown v. Clark* (1880) 44 Mich. 309, 7 N. W. 679; *Curtsey*, 17 C. J. 417.

14. *Myers v. Hansbrough* (1907) 202

Mo. 1. c. 500, 100 S. W. 1137.

15. *O'Brien v. Ash* (1902) 169 Mo. 1. c. 294, 69 S. W. 8; *Farmers Bank v. Hageluken* (1901) 165 Mo. 1. c. 451, 65 S. W. 728; *Kirkpatrick v. Pease* (1907) 202 Mo. 1. c. 490, 101 S. W. 651.

16. *Ennis v. Eager* (1911) 152 Mo. App. 1. c. 497, 133 S. W. 850.

spouse to the property of the other which took effect upon marriage as did dower and curtesy at common law. Perhaps the right is less than a perfect vested right, but a so-called inchoate right. Nevertheless it is an interest in property which upon certain contingencies ripens into possession, the chief benefit of ownership of property. It was this inchoate right the court of equity protected in the case under review.

The view that not even inchoate rights of property upon marriage are created by the twin statutes seems a too narrow and literal reading of the statutes. The legislative intent was not merely that the property mentioned would go to the surviving spouse in case it was on hand at death. More was meant. These statutes are not mere statutes of descent and distribution. New *jus mariti* in property were created. The interest of the spouse is not the mere expectancy the prospective heir has in the prospective ancestor's property. It is a right like dower and curtesy subject to the contingency of survivorship and failure to dispose of the property openly and without concealment. This being the nature of the right ample power existed in the Chancery Court to prevent any fraudulent devise by a spouse to destroy the right when no rights of innocent third parties were involved.

The holding of the principal case is clearly in line with the majority rule in other states.¹⁷ An especially well considered case involving this question is *Wright v. Holmes*.¹⁸ The decisions do not prevent either party from disposing of property free from the statutory right during his or her life, provided the conveyance is not "a more colorable one" and the benefits are not reserved to the grantor during life.

To make the transaction a mere colorable one it must be an immediate gift in form, but not in fact. The property must be so disposed of that the wife retains the use and profits during her lifetime, but the title passes to her grantee. If she has not parted with the title the husband could take without the aid of a court of equity as she would then die with the property belonging to her. The mere fact that the conveyance is made for the express purpose and with the intent to deprive him of his marital rights is not sufficient.¹⁹ There must be coupled with the intent secrecy and want of consideration. A colorable transaction is one which is secret, without consideration, reserves the beneficial interest during her

17. *Browson v. Browson* (1876) 35 Mich. 415; *Walker v. Walker* (1890) 66 N. H. 390, 27 L. R. A. 799; *Brown v. Crafts* (1903) 98 Me. 40, 56 Atl. 213; 3 L. R. A. (N. S.) Note 774-775.

18. *Wright v. Holmes* (1905) 100 Me. 508, 65 Atl. 507; In upholding the right of a wife to make a *donatio causa mortis* of her personal property thereby depriving her husband of a distributive share

the court said, "He may dispose of his personal property absolutely . . . provided the transaction is not merely colorable, and is unattended by facts indicative of some other fraud upon her than that arising from his transfer to prevent her having an interest after her death."

19. *Leonard v. Leonard* (1902) 181 Mass. 458, 63 N. E. 1068.

life, to the grantor and is done with intent to defraud the husband of his marital rights.

There are some decisions which take the contrary view. The only question, according to the minority view, is whether or not there has been a valid conveyance to the third party. The interest of the husband, it is argued, is not a vested one and if the wife so disposes of her property as to vest title in some one else, there is nothing for her husband. The minority view is well stated in an Alabama case,²⁰ which holds that it is impossible to predicate a fraud under such circumstances.

The interest which the husband acquires under Sec. 350, *supra*, is not an absolutely vested estate until his wife's death. Since the interest is not strictly vested, since the wife had the power to convey her property and since there was no curtesy because of no children born to the marriage,²¹ according to the minority rule, the wife, in the principal case, would have deprived the husband of all interest in her real estate. The deeds were valid between the parties since they had been executed for a sufficient consideration²² and delivered.²³

From a strictly legal standpoint, the minority rule would seem to be supported by the better reasoning, but upon equitable principles the Missouri doctrine is sound. The deeds were not an attempted testamentary disposition of the property because they vested a present right to the property in the nephews.²⁴ Nevertheless, they accomplished that result. The wife retained possession of the property during her lifetime, enjoyed its benefits and upon her death it descended not as the statute directed but contrary to it. Here there was clearly an attempt to evade the statute. The surviving spouse, if the property is not in good faith disposed of during lifetime, has an equitable right that it descend according to the statute.

It is submitted, that the rule in the principal case protects this interest

20. *Lightfoot, ex v. Colgin* (1813) 5 Munf. (Va.) 42; *Hatcher v. Buford* (1895) 60 Ark. 169, 27 L. R. A. 507; *Williams v. Williams* (1889) 40 Fed. 521; *Lines v. Lines* (1891) 142 Pa. St. 149, 21 Atl. 809; *Robertson, Adm. v. Robertson* (1905) 3 L. R. A. (N. S.) 774, 147 Ala. 311, 40 So. 104; In upholding this doctrine the court quoted with approval the following from *Ford v. Ford*, 4 Ala. 142 . . . "He has by law, during his life the most absolute and unqualified dominion over it. The only restriction which has been imposed on him in favor of his wife is in its disposition after his death. It is difficult to conceive how a disposition of property, made in the life-

time of the husband to take effect immediately could be fraudulent against the wife as no right vests in the wife until death."

21. *Lock v. McPherson* (1901) 163 Mo. l. c. 498, 63 S. W. 726; *Farmers Bank v. Hageluken* (1901) 165 Mo. l. c. 451, 65 S. W. 728; *Kirkpatrick v. Pease* (1907) 202 Mo. l. c. 490, 101 S. W. 651.

22. *Masterson v. Sheehan* (1916) 186 S. W. 524, 18 C. J. 166.

23. *Sneathen v. Sneathen* (1891) 104 Mo. l. c. 209, 16 S. W. 497; *Harvey v. Long* (1914) 260 Mo. 374, 168 S. W. 708.

24. *Christ v. Kuchen* (1903) 172 Mo. 118, 72 S. W. 537; *Sims v. Brown* (1913) 252 Mo. l. c. 66, 158 S. W. 624.

and is in accord with sound equitable principles affording relief against fraud where there is no relief at law.

IRVING C. NEALE²⁵

AUTOMOBILES—DEGREE OF CARE—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE. *Threadgill v. United Railways Company of St. Louis.*¹—Acknowledgment is made to Mr. Arthur W. Allen, of Springfield, Mo., who has called attention to the fact that Laws 1911, page 330, subsec. 9,² under which the above case was decided was repealed by Laws 1917, Motor Vehicles, p. 404, sec. 1, and that under sec. 11, p. 413 of the latter act, the duty of the driver of a motor vehicle is to "drive the same in a careful and prudent manner. . . ."

In a note reviewing the principal case in Law Series 18, University of Missouri Bulletin, mention of the Act of 1917 should have been made as showing that the legislators had themselves seen the fallacy of saying that (so far as the driver of a motor vehicle is concerned) there can be any degree of care other than due care under the circumstances, i. e., the care of a careful and prudent person. But the object of the note was to show the unsoundness of the theory that there can be more than that one degree of care and the use of *Threadgill v. United Railways, supra*, was made to exemplify the fallacy of the theory.

It is to be confidently expected that in causes of action involving the duty of motor vehicle drivers to use care, arising since January 31, 1918, at which time the Motor Vehicle Act of 1917 went into effect, such expressions as "highest degree of care" will not be used.

B. W.

25. Student, School of Law.—Ed.

1. (1919) 214 S. W. 161.

2. Provides that motor vehicles shall be driven with "the highest degree of

care that a very careful person would use under like or similar circumstances."

BAR BULLETIN

EditorKENNETH C. SEARS

Associate Editor for Bar AssociationW. O. THOMAS

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"Why do you refuse to answer the question, madam?" asked a lawyer of a lady witness, scenting a favorable disclosure.

"Because my answer ought not be heard by any honorable person," replied the witness.

"Well, then, madam," said the counsel, "whisper it in the ear of the judge."

The whisky deceased had on the seat in which he was riding, unsupported and with a serenity worthy of a better cause, withstood the drive over said depression, and was taken therefrom without breaking a bottle or spilling a drop.—Mozley, C., in *Reese v. City of St. Louis*, 216 S. W. 315.

A suit has been instituted in Caldwell County by Maud L. Meredith against the Business Men's Accident Association of Kansas City because of the death of her husband (the insured) as the result of the falling of an airplane in which he was a passenger at the rate of \$1.00 per minute. One clause of the policy provides that the policy shall be void if the accident occurs while the insured was participating in aeronautics.

BURDEN OF PROOF—The cause of action is founded on the negligence of the bailee. While the burden of proof is upon plaintiff to show such negligence, and that burden never shifts, plaintiff sustained the burden upon him by merely pleading and proving the fact of bailment, and the failure or refusal of defendant to return the property on proper and timely demand. The burden of bringing forward evidence, but not the burden of proof, then shifted to the defendant, to excuse his failure to return the property by showing that the loss was due to a cause consistent with the exercise of reasonable care on his part. . . . If defendant's evidence disproving negligence on his part and the proof of negligence arising in favor of plaintiff on his showing were equally balanced, then the verdict must have been for the defendant, as it was not the duty of the defendant to show by the preponderance of the evidence that he was not negligent. On the other hand, it was the duty of plaintiff to show by the preponderance of the evidence that the defendant was negligent.—Bland, J., in *Vaughn v. Jackson*, 216 S. W. 331.

Well stated and very refreshing after reading many decisions wherein the phrase "burden of proof" is handled without any discrimination.

Since the present consolidation of The Bar Bulletin and The Law Series has been arranged, two communications of interest have been received. One was from the School of Law at the University of Iowa, which publishes a bulletin and which is planning to make its bulletin the official publication of the Iowa Bar Association. The other was from Dean Richards of the Law School at the University of Wisconsin, which contemplates starting a bulletin, and consideration is being given to making it the official publication of the Wisconsin Bar Association.

Not long ago, an Irish lawyer, while arguing with the earnestness of his race, stated a point which the court ruled out. "Well," exclaimed the attorney, "if it please the court, if I am wrong in this I have another point that is equally as conclusive."

These two constructions of this law (Section 6354, R. S. Mo. 1909) have already led to inconsistent and conflicting opinions, as will be seen by turning to the last case we have been able to find, decided by the Supreme Court, where a great many cases are discussed in an opinion by Woodson, J., it being the case of *Wagner v. Binder*, 187 S. W. 1128.—Farrington, J., in *Stratton v. Cole et al.*, 216 S. W. 976.

The section is being held in reserve for an article which it is hoped to present during the next scholastic year.

CODE OF ETHICS—After the receipt of the article written by Mr. Ashley of Kansas City, published in Law Series 18, the Secretary of the

Association called attention to the fact that the Constitution of the Missouri Bar Association as amended in 1918 contains the following: "Article 5.—This Association hereby adopts the Canons of Ethics adopted by the American Bar Association at its thirty-first annual meeting, as contained in Volume XXXVIII of the reports of the American Bar Association." *Reports, Missouri Bar Association*, 1918, p. 28. It is hoped that these canons may be published from time to time in the Bar Bulletin. Meantime, if the Supreme Court will adopt Mr. Ashley's suggestion there will be no excuse for an accused lawyer to set forth his ignorance even in extenuation.

With nine divisions of the Circuit Court in Kansas City from January 1st to April 1st, 1919, 153 jury and 113 court or jury waived cases were tried and disposition was made of 239 default cases. But the cost to Jackson County was \$50,000.—John S. Wright, Kansas City Bar Association Banquet, March, 1920.

FIRST CANON—There are at least two methods of enforcing the first canon. If it is violated the Bar Association can pass a resolution condemning the guilty attorney. If the conduct was inspired by ulterior motives such as a desire to satisfy political ambitions then the members of the Bar should refuse to support for any office any man who has resorted to such means. *Nota*, reader:

It is the duty of the lawyer to maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

CANDIDATES FOR APPELLATE COURTS.—Attention is directed to the action of the St. Louis Bar Association in appointing a committee to investigate the qualifications of the candidates for positions on the appellate courts. President German of the Kansas City Bar Association has expressed his desire to cooperate with the St. Louis Bar Association. This action is only a recognition of the second canon and will have the approval of all forward looking lawyers. It is our expectation to publish the report of the committee. Meantime, the Bar should consider the second canon:

It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. It should protest earnestly and actively

against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated there to only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

SELECTION OF JUDGES—There is a need for considering the subject of judicial selection and tenure as long as there are a large number of persons who think that experts can be successfully chosen with current election methods. Under the convention system of nominating this question was not fairly presented for more than half a century. Nominating was limited to a few and there was usually some degree of expertness available. If both of the leading parties nominated good candidates, which was always possible, popular election appeared to be very successful, tho in fact it was not popular election at all, but only a form of appointment by party leaders.

Primary nominations have largely ousted party leaders from this function, and to that extent have reduced the elements of responsibility and expertness which existed under the convention system. We have far more candidates for judicial office now than ever before, and there are more lawyers possessing judicial qualifications who refuse to be candidates than ever before.—*Journal of the American Judicature Society*, April, 1920.

LEGAL EDUCATION—I have consumed so much time that I will not dwell upon the desirability of a college law education. Without being dogmatic, but because impressed with its extreme importance, I may, however, be allowed to say that I have never heard an argument against it worthy of the name, except that it deprives the indigent youth of an opportunity to enter into a profession of which he might become a worthy and perhaps ornamental member. The argument, however, forgets that individual aspirations yield to public necessity; that the lawyer is an officer of the state, placed as a guardian between the right and the wrong, between justice and injustice; and that it behooves the state to make no mistake in the protection of its citizens against the errors of the uninformed and incompetent. At this day no one protests against a technical collegiate course for a physician, and surely the health and life of the citizens of a commonwealth are not of more moment than their fortunes, reputations, and morals, all of which are clearly within the influence and care of members of the legal profession.—*William A. Blount*, Pensacola, Florida, Bar, at American Bar Association, September 3, 1919.

January 22, 1920.

Calvin & Rea,
Kansas City, Mo.
Gentlemen:

Inclosed find return on Tracy service. Kindly mail check \$4.00 charges.

Very truly yours,

JOHN F. DOWDEN,
Sheriff.

Defendant says, "she needn't be a damned bit alarmed I won't appear."

Suggestions addressed to the editor of the Bar Bulletin, Columbia, Missouri, as to needed legislation which will come within the purview of the association are invited. They will be referred to the appropriate committees.

Letters have been sent by the President and Executive Committee of the association to the local bar associations in Missouri, most of which were organized in the last two years, urging them to hold meetings, if they have not done so, and to make reports of their activities, so Bulletin readers may know how they are progressing. The committee offers to furnish speakers at such meetings if so desired. The greater local interest, the more successful will be the state work.

The Bulletin staff is somewhat inclined to become self congratulatory over this issue. Without disparaging the other able communications, special attention is directed to the stirring address to the lawyers of Missouri by Mr. Hampton L. Carson of Philadelphia, President of the American Bar Association. On two occasions Mr. Carson has appeared before the Missouri Bar Association, and his scholarly addresses are found in the annual reports. His present message is most timely in view of the fact that St. Louis will have the honor of entertaining the American Bar Association in August of this year.

In the past criticisms were heard that the Missouri Bar Association was run by a clique; that corporation lawyers controlled its activities in behalf of their clients; that the Association accomplished nothing, etc. If any reasons for such inferences ever existed, they are of the past. The Missouri Bar Association is composed of lawyers dominated in their combined work with the desire to advance the standards of their profession and render service to the commonwealth. The war work showed the true spirit of the lawyer. His patriotism was then aroused and most nobly and sacrificially he did his bit. While the war has been won, its aftermath still disturbs. The perilous days of reconstruction have not

yet passed. Of course the lawyer will still perform his patriotic duty, but he can be much more efficient through cooperation with his fellow lawyers. If he is weak he will be strengthened; if he is strong he will impart his strength to others and gain by giving. Every consideration, whether selfish or altruistic, impels the lawyer to take part in the cooperative work of the association. These suggestions are addressed to the two thousand lawyers of Missouri who are not members of the Missouri Bar Association. Come in, the water is fine.

One of the charming graces attendant upon greatness is modesty. Her gentleness, her smiling timidity, her blushing bashfulness, her gracious self-abnegation, all conspire to smooth the rough edge of talent and lay weight upon the sturdy wings of presumption. And yet (pardon the mixed metaphors) sometimes she becomes the mistress of genius, who, while reposing in her lap, she Delilah like, shears him of his strength. In something of this manner various and sundry lawyers and judges of talent and reputation throughout Missouri, who have been requested on the principle of *noblesse oblige* to contribute of their intellectual wealth to the Bar Bulletin, have been so soothed by the stroke of Modesty's hand as to forget to even answer the requests. The mysteries of some human natures are surely mysterious.

At the last meeting of the State Judicial Conference held at Kansas City on October 2, 1919, a resolution was adopted providing that the chairman should appoint a committee of five on Amendments, Judiciary and Procedure, to act in co-operation with a similar committee of the State Bar Association. In compliance with this resolution, the chairman of the Judicial Conference has appointed the following committee: Judges James Ellison, Ralph Hughes, J. Hugo Grimm, B. G. Thurman and E. M. Dearing.

"Hon. James C. Jones, Attorney, of St. Louis, delivered the annual address: subject, 'Why Is the Constitution of the United States?' before a fine audience filling the Supreme Court room.

"At the conclusion of the address Robert Stone voiced the sentiments of all present in stating that the address was a very remarkable one, an inspiration to every lawyer in Kansas to render a distinct and valuable service to his country in standing for the constitution of the United States, and in helping to educate the people of his state to an understanding of that great document which has preserved the liberties of the people of this country and thru them has saved those liberties to all the world. Mr. Jones' address was remarkable in that it had shown to the members of the bar a way in which they could render this service to their country.

In recognition of the service which Mr. Jones had rendered, Mr. Stone moved that he be made an honorary life member of the Association. The motion was unanimously adopted.

"J. S. West suggested that in view of the wonderful scope and strength of the address and the awakened interest in the subject at this time, the speaker be asked to furnish to the Secretary of the Association copies of his address for publication in the two Topeka daily newspapers. The suggestion was put in the form of a motion and unanimously adopted."—(Proceedings 1920 Bar Association of Kansas, p. 20.)

A MESSAGE FROM THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION

There are many substantial reasons in favor of the claims of the American Bar Association upon the loyal support of lawyers throughout the entire country, and there are many advantages to be secured by membership in such a body. I cannot within the limits of a short article state them all, nor can I elaborate, but the following are the salient features.

I. The American Bar Association represents a great brotherhood in the purest sense. It is the tie of fraternal interest in all that concerns the profession that binds it together. It is not a corporation for profit; it is not a partisan organization; it is not a social club; it is not a selfish nor exclusive coterie. It is a voluntary association to promote the highest aims of the profession, to broaden its knowledge, to uplift and sustain its ethics, to simplify and coordinate principles and practice, to unify law upon subjects of common concern, to facilitate an interchange of views, to promote rational reforms, and to cultivate good fellowship.

II. Its organization is thoroughly representative of the Bar Associations of all the states. Every State Bar Association is notified to send and in practice does send delegates and alternates to the annual meeting of the National Association. These, with visiting members of the said state, meet every year in separate State Conferences on the spot and elect one of their number as a member of the General Council, which thus consists of a single member from each state in the Union, and of a representative from Porto Rico, Alaska, Hawaii, the Philippines and the American Bar of China. Thus the Council is free from any sectional or local control and represents the Bar Associations of every State in the Union as completely as the Senate of the United States represents the States. The Council chooses its own Chairman every year, the same chairman being ineligible for re-election after three years of successive service, if he should be so chosen. The Council nominates not from its own membership, but from the members of the Association at large, an Executive

Committee, whose functions I will touch upon presently. The Council also nominates to the Association at large the officers for the ensuing year, whose functions and powers are defined in the Constitution and are regulated by the By-laws. The election of these officers is by the Association itself in open session, in practice by acclamation, but in theory and in power within the rights of the association to act otherwise.

The Executive Committee consists *ex officio* of the President, the last retiring President, the Chairman of the General Council, the Secretary and the Treasurer, together with eight other members elected by the Association upon nomination by the General Council, but no member shall be elected more than three years in succession. The Executive Committee is charged with the executive business of the Association; it passes on the nominations for membership made between the sessions of the Association by the State Local Councils, it plans and arranges the program of exercises for the next annual meeting, including two and sometimes three addresses from jurists, statesmen or publicists of position, and the selection of the speakers at the banquet. All requests for the appropriation of money made by the Chairmen of Standing Sections or of Special Committees as well as allowances to the officers for actual expenses, must be approved by the Executive Committee. There is no power to bind the Association by implication and not a dollar of salary or compensation of any kind for services, however arduous or prolonged, has ever been received by any officer since the birth of the Association forty-three years ago, and during all that time there have been but two treasurers and but three secretaries, whose unselfish devotion and loyalty to the work have contributed immeasurably to our success. Ardor, pride, honor and loyalty have not been bought.

III. The membership is open to every lawyer in good standing of the Bar of any State for a period of three years next preceding his nomination. Nominations for membership must be approved by the Local Council of each state, and these nominations, as approved and passed upon by the Local Councils, must be approved by the Executive Committee in the interim between sessions and by the general Association at annual meetings. A vote is taken *viva voce* unless a ballot be demanded. Five negative votes from the floor shall prevent an election and one negative vote of the Executive Committee shall prevent an election.

IV. The professional work of the Association is entrusted to six Sections and eleven Standing Committees. The scope and character of the work are sufficiently indicated by the following sub-titles: Legal Education and Admission to the Bar; Patent, Trade Mark and Copyright Law; Judicial Section; Comparative Law; Public Utility Law; Criminal Law and Criminology; Commerce, Trade and Commercial Law; International Law; Insurance Law; Jurisdiction and Law Reform; Professional Ethics

and Grievances; Admiralty and Maritime Law; Publicity; Publications; Noteworthy Changes in Statute Law; Membership; Memorials.

The sections formerly existed in the shape of Standing Committees acting largely on their own initiative as to expenditures and programs, but under the recent amendment of the Constitution, they became integral parts of the organization and are thus brought into close, definite and uniform relationship to the Association itself. In this way clashes of arrangements and unequal, undue drafts upon the treasury are avoided.

As to the work done, it would require a volume to digest the results of what has been voluntarily undertaken and admittedly discharged in the various lines indicated. The effects of the work upon Congressional and State legislation, as well as upon judicial sentiment and professional scholarship, are readily traceable thru the annual reports. The body of legal literature thus built up, representing the best and ripest thoughts of the professions, has commanded respect both at home and abroad and has served the useful purpose of co-ordinating the labors of law teachers, practitioners, legislators and reformers, fusing the thoughts of men of affairs with those of students and theorists working with a common zeal for the common good.

No one who takes the pains to examine consecutively the annual reports can fail to perceive a steady, continuous, expansive and progressive development in all the fields of legal activity and a gratifying elevation of standards of conduct and of thought. Impulsive reformers have been checked by prudent conservatism, and stubborn prejudices in favor of the past have given way to rational improvements.

V. To enlarge the bounds of discussion and afford opportunity to those anxious to appeal to the conscience and intellect of the profession, two new features have been added to this year's program. The first relates to an Open Forum, and the second to improvement of the Journal.

As to the first, there will be an open debate between masters of the subject upon Legal Aid Societies. The participants will be eminent.

A second session will be devoted to an open discussion upon "How can we best promote the welfare, interest and scope of action of the American Bar Association?"

As to the Journal, a special committee, or successor of previous committees, has held numerous sessions and will shortly announce a plan by which the Journal will in the course of time be elevated to the highest rank as a professional organ of opinion and as a useful bulletin of achievements accomplished thruout the year, thus bringing to the knowledge of all members of the association at the earliest practicable moment the work of the courts, of Congress, of State legislators, of scholars, of practitioners and of reformers, so that the reader may be in constant touch with the real life of the profession. All that has been done or is doing, all that is in the air, as well as all that has been accepted as wholesome, will

be entitled to notice. The success of the Journal depends upon the support that it can command. The enormous energies of the profession, its best brain power, as well as its highest aspirations, can here find expression. Like a fully equipped orchestra it can render an adequate professional symphony, if time and care are expended in the selection and drilling of the staff. The Journal of the American Bar Association can be made and should be made the most conspicuous and influential publication of the year. It should be the ambition of every member to see that it is so. But it would be manifestly unfair to allow the weight of so great an undertaking to rest upon the shoulders of a few. To make it a success, generous expenditures will be required and a greatly enlarged membership must be enlisted in its support. Time, patience, and loyalty will solve the problem. The right to receive this journal is one of the privileges of membership, and is included in the payment of the modest annual dues.

VI. Let me add a few words upon the educational advantages of membership. No lawyer, wherever resident, will be disposed to deny that he is benefited by contact with his fellow practitioners, and that as the circle of his relationship broadens from town to county, and from county to state, his perceptions are sharpened, his judgments strengthened and his sympathies nourished by the big problems of administrative justice. The step from membership in a State Bar Association to that of membership in the American Bar Association is a normal advance, and the breadth of view thus gained is inspiring. New light breaks in even upon purely local questions, while there is a keener recognition of the might, the majesty, the vitality, the all pervading sufficiency of the common law. Men of the great cities hail as brothers the men of the plains and the mountains, and the mountaineers and plainsmen are enlightened as to the perplexities and intricacies of questions affecting congested communities. Exchange of views between men from different states is wholesome, and a mental exhilaration follows as beneficial as that derived from travel amid new scenes, whether foreign or domestic.

Then, too, the sight of the leaders of the bar of the nation is stimulating. It adds much to the interest with which a decision of a court is read, if the judge delivering the opinion is not an abstraction, but a creature of flesh and blood whose personal appearance is known and whose voice has been heard. The same is true of the great advocates. I recall with pleasure the circumstances of having seen and heard E. J. Phelps, of Vermont, while discoursing upon John Marshall; Thomas J. Semmes of Louisiana, eulogizing Roger B. Taney; Henry Hitchcock, of Missouri, comparing views with Professor James Bradley Thayer, of Massachusetts, upon the growth of Constitutional Law; Courtland Parker of New Jersey, holding up the career of Sir Matthew Hale, as a model judge; John Dillon in conversation with Justice Joseph P. Bradley as

to the new features of the latest edition of "Dillon on Municipal Corporations"; Joseph H. Choate swapping stories with John Randolph Tucker, of Virginia; George H. Williams, Attorney General of the United States in Grant's Cabinet, fencing with Wayne Mac Veagh. I need not further illustrate, altho I might do so indefinitely. Judging from the effect on myself as a young man, I believe young men, and even those of middle age, would derive similar inspiration and enlightenment from seeing and hearing the leaders of today while grappling with the most pressing of problems. Of these things I am sure, that the sense of brotherhood, belief in the friendliness and nobility of the profession, will be strengthened by such contact, and faith in the wisdom and justice of the law will be justified by experience. The reserve potential strength of a profession such as ours can be summoned to effective exercise only thru an association, national in its scope, and wielding the consolidated strength of a united and thoroughly patriotic Bar.

Philadelphia, Pa.

HAMPTON L. CARSON.

RULES OF PROCEDURE

The Senate of the United States has under consideration Senate Bill 1214 which was introduced by Senator Kellogg and which is intended to vest authority in the Supreme Court to make rules of procedure in law cases as the court has already done in equity cases.

The Bill reads as follows:

To authorize the Supreme Court to prescribe forms and rules, and generally to regulate pleading, procedure, and practice on the common-law side of the Federal courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court shall have the power to prescribe, from time to time, and in any manner, the forms of writs and all other process; the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; drawing up, entering, and enrolling orders; and generally to regulate and prescribe by rules of the forms for and the kind and character of the entire pleading, practice, and procedure to be used in all actions, motions, and proceedings at law of whatever nature by the district courts of the United States and the courts of the District of Columbia. That in prescribing such rules the Supreme Court shall have regard to the simplification of the system of pleading, practice, and procedure in said courts, so as to promote the speedy determination of litigation on the merits.

Sec. 2. That when and as the rules of court herein authorized shall

be promulgated, all laws in conflict therewith shall be and become of no further force and effect.

The present law provides as follows:

Sec. 914. (Practice and proceedings in other than equity and admiralty causes.) The practice, pleadings, and forms and modes of proceeding in civil causes other than equity and admiralty causes in the circuit and district courts shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.

It was the purpose of Congress in enacting this statute which was originally passed in 1872 (17 Stats., 197, sec. 5), to make the practice in the federal courts more simple, and to obviate the necessity of the Bar becoming familiar with two different and entirely distinct systems of procedure in the same locality; namely, the procedure used in the State courts and the procedure used in the federal courts.

The necessity of a simplified procedure has always been recognized both by the Bench and the Bar. Statistics bear out the general proposition that more than fifty per cent of the points actually decided by appellate courts in cases coming before them on appeal are points of practice as distinguished from points of substantive law and such a condition is intolerable.

The federal courts, in construing the law above set out, very early announced the rule that it was the duty of the federal courts, as well as their right, "to reject any subordinate provisions of the state statutes and any rule of practice of state courts which in their judgment, will, unwisely incumber the administration of the law or tend to defeat the ends of justice in their tribunals." *O'Connell v. Reed*, 56 Fed. Rep. 531, 538. The adoption by the federal courts of the state court's rules of procedure is not absolute but only "as near as may be" and there is therefore under the present practice a combination of federal rules and state rules in every federal court and that tends to confusion.

In 1873 and 1875 the English Parliament vested the whole authority for making detailed rules of practice, procedure and pleading upon the courts and the effect has been most gratifying in a resulting simplicity of practice. It may be safely said that the English Bar is, to a man, in favor of the plan which has been so successfully tested for so many years.

Some states have already adopted laws vesting in the courts the power of making rules of procedure, particularly in New Jersey, Colorado and Virginia. In New Hampshire the courts themselves have held that they possess the authority to regulate the details of practice when there is no legislative prohibition in the matter.

The American Bar Association and the State Bar Associations throughout the country are strongly in favor of the passage of the Bill and have again and again sent delegations to Congress supporting the wisdom and the efficiency of its provisions.

The arguments generally made in favor of the Bill are:

A. That the same reason which led the Supreme Court to promulgate rules in equity cases which have been generally approved and cordially accepted applies to the law side of the court.

B. That definite rules, the same in every Federal court, tend toward simplicity, lessen points of dispute in regard to matters of procedure and make for efficiency in the prompter final determination of pending litigation.

C. That the Supreme Court is most familiar with rules which are necessary in practice and first to appreciate the necessity of any change or modification, and with the power vested in them of making such rules there will result an immediate revision that can not be accomplished by Congress.

D. That the need of rules of procedure in law cases which are capable of clear understanding and which can be easily applied is generally recognized and that no agency exists which can accomplish this purpose so accurately, so quickly or so satisfactorily to the Bar as the Supreme Court.

E. That it is most unfortunate to have different forms of procedure in federal courts of equal jurisdiction located in different states.

F. That the constitutionality of the vesting of the power to make such rules in the Supreme Court is unquestioned. *Beers v. Houghton*, 9 Peters, (U. S.) 359; *Bank of the United States v. Halstead*, 10 Wheat. 51; *Rose's Code of Federal Procedure*, Vol. 1, p. 833.

G. That any alteration that may be necessary arising out of any changed conditions can be instantly effective if the Supreme Court is given power in the matter, whereas if, as is now the case, an Act of Congress is necessary in the premises, it becomes at once practically inefficient.

H. That any vesting of the power in the Supreme Court to make rules would not deprive Congress of its complete control, if at any time it desired to exercise it.

The objections urged against the Bill, so far as I have become familiar with them are:

a. That its constitutionality is not beyond doubt.

b. That it will require the practitioner to become familiar with two modes of procedure, one for his work in the state court and one for his work in the federal court.

c. That Congress should alone exercise the power of making any general rules of procedure because the formation of such rules is more legislative than judicial in character and can be best exercised either by

the direct action of Congress or as the result of the work of a commission authorized by Congress.

d. That the general rules already adopted in equity cases have not proved simple or satisfactory.

The Bill has been referred by the Judiciary Committee of the Senate to a sub-committee consisting of Senator Colt, Senator Dillingham and Senator Walsh. My information is that a majority of the sub-committee and a majority of the committee of the Judiciary are in favor of the Bill.

Washington, D. C.

SELDEN P. SPENCER.¹

CARRIER'S LIABILITY FOR NEGLIGENCE OF DIRECTOR GENERAL OF RAILROADS

The liability of a carrier for negligence during Government operation of the railroads has been differently determined by the courts of different jurisdictions.

While the United States Supreme Court has not clearly passed upon this question as yet, under the logical reasoning of Chief Justice White, in the case of *Northern Pacific R. R. Co. v. State of North Dakota* (1919) 250 U. S. 135; s. c. 172 N. W. 324, there would seem to be no doubt but that the Director General of Railroads will be held solely liable for damages resulting from his negligence or that of his agents or employes during the period that the Government was in possession of and operating the railroads, and that a carrier cannot lawfully be held for the negligent acts of the Director General or his agents or employes.

In the North Dakota case, the Supreme Court said: "No elaboration could make clearer than do the act of Congress of 1916, the proclamation of the President exerting the powers given, and the act of 1918 dealing with the situation created by the exercise of such authority, that no divided but a *complete possession and control* were given the United States *for all purposes* as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came and all other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, *the*

1. Senator Spencer is the junior senator from Missouri and for some years has been special lecturer on Corporation Law in the School of Law.—Ed.

complete possession by governmental authority to replace for the period provided the private ownership theretofore existing."

If the conclusion reached in this case by the highest court in our land is correct, i. e., that the act of Congress and the proclamation of the President resulted in transferring "the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing," and "that no divided but a complete possession and control were given the United States *for all purposes* as to the railroads in question," then, how can it be claimed that the railroad company, deprived of all control during the operation of its property, may yet be held liable for negligence in its operation?

Clearly such a holding would be counter to fundamental principles of organic law, since it would take the property of one citizen to pay the debt or obligation of another, when that other was in no legal sense empowered to bind the party held.

During the period of Government operations, the agents and employees engaged in the operation of railroads were clearly employees of the Director General, who was engaged in the operation of trains and railroads thru his agents and employees.

Contracts for transportation by passengers were clearly, during this period, the contracts of the Director General and not of the carriers, who had been completely dispossessed of their property during the period of Government operation.

The railroad companies, during the period of Government operation, were clearly not engaged in the business of a common carrier, since they had no trains to operate, nor any agents or employees engaged in the operation of trains, but the property of the carriers, after the President's Proclamation, according to the opinion of the Supreme Court of the United States, was completely transferred to the Director General of Railroads "for the period provided."

As reasoned by Judge Booth, in the case of *Dooley v. Penna. R. R. Co.*, 250 Fed. 143: "It needs no argument to show that it was necessary, in order that these powers be made effective, that the possession, the control, and the utilization of the property should be exclusive, and not subject to interference by private parties."

Judge Booth's opinion is quoted and approved by Judge Ray in *United States v. Kambeitz*, 256 Fed. 247, wherein it was said: "Neither the United States, nor the President, nor the Director General, is doing this as agent for the railroads or the transportation companies. The United States, thru its officers and agents, is doing all this on its own purposes, including service to and for the general public. The United States is not in partnership with these transportation or railroad systems."

Some of the state courts have predicated the liability of the carrier, during the period of Government operations, upon the provisions of

Section 10 of the act of Congress, which provides: "Carriers, while under federal control, shall be subject to all laws and liability as common carriers whether arising under state or federal laws or at common law, except insofar as may be inconsistent with the provisions of this act" etc.

In *Ault v. Missouri Pacific R. R.* the Supreme Court of Arkansas held that the carrier was liable under this section of the act of Congress for the wages due an employe, during the period of Government operation, who before had been paid by the Director General of Railroads. This case was decided November 17, 1919, and is now pending in the Supreme Court of the United States.

The reasoning of the Federal Courts, however, is almost uniformly to the effect that the predication of liability against the carrier for acts of the Director General, during the period of Government operations, would be "inconsistent with the provisions" of the act of Congress, and that it was not the intention of Congress to make the carriers liable for the negligence of the Director General. *Rutherford v. Un. Pac. R. Co.*, 254 Fed. 880; *Haubert v. B. & O. R. R.*, 259 Fed. 361.

Judge Munger, in the Union Pacific case, held that the office of Director General was analogous to that of receiver of railroad companies, and, in the B. & O. case, Judge Westenhaver observed: "Manifestly, it seems to me that in view of these conditions no liability exists against the railroad company itself for a personal injury due to operation under federal control, and that no judgment can be rendered therefor which will become a lien upon the *corpus* of its property or payment compelled therefrom."

In *Nash v. Southern Pacific Co.*, 260 Fed. 280, Judge Van Fleet sustained a motion to substitute the Director General as defendant and to dismiss the railroad company upon the same line of reasoning, and, in *Hatcher & Snyder v. A. T. & S. F. Ry. Co.*, 258 Fed. 952, Judge Lewis reached the same conclusion as the result of an exhaustive and logical opinion.

Non-liability of the company was adjudged *nisi prius* in the case of *Schumacher v. Penna. R. R. Co.*, 175 N. Y. Supp. 84; and see also *Dahn v. McAdoo*, 256 Fed. 549; *Southern Cotton Oil Co. v. Atlantic Coast Line Railroad*, 257 Fed. 138; *Wood v. Clyde Steamship Co.*, 257 Fed. 879.

Judge Hand, for the Southern District of New York, in *Jensen v. Lehigh Valley R. Co.*, 255 Fed. 795, construing section 10 of the act of Congress, held that Congress intended that "The 'carriers,' the corporations, themselves," should be held liable until their liability was changed by some valid provision. But Judge Hand and the Supreme Court of Arkansas are clearly at variance with the reasoning and logic of the Supreme Court of the United States in the North Dakota case (250 U. S. 135), and with the conclusion of the Springfield Court of Appeals (Missouri) in the recent case of *W. W. Cravens and the Bank of Poplar Bluff*

v. Mo. Pac. R. R. and Walker D. Hines, Director General, 218 S. W. 912. See, also, *Ringquist v. Duluth, Missabe & Northern R. R.* decided by the Supreme Court of Minnesota.

Upon this subject, the decisions of the United States Courts are controlling upon the State Courts. In *Mardis v. Walker D. Hines and the Missouri Pacific Railroad Company*, 258 Fed. 945 the District Court of the United States for the Western District of Arkansas sustained a demurrer on behalf of the railroad company to a joint action against the Director General and the Railroad Company, and the case is now pending on writ of error in the United States Circuit Court of Appeals for the Eighth Circuit. As this is one of the strongest courts in the country, the opinion in this case, when rendered, will reflect both the logic and the law upon this subject.

St. Louis, Missouri.

EDWARD J. WHITE.¹

COMMITTEE REPORT

In view of the fact that the Minutes of the 1919 meeting of the Missouri Bar Association have not yet been published, the following report of the Committee on Amendments, Judiciary and Procedure will be of interest to the many attorneys who did not attend the meeting:

Kansas City, Mo., October 3rd, 1919.

To the Missouri Bar Association:

Your Committee on Amendments, Judiciary and Procedure would report that in compliance with the will of this body, as expressed at the 1918 meeting thereof, legislative bills covering the seven measures approved were presented to the last General Assembly for enactment, as follows:

1. An Act repealing Sections 950 to 963, inclusive, of Chapter 9, R. S. 1909, relating to the disbarment of attorneys, and enacting ten new sections in lieu thereof.

2. An Act repealing 125 sections of Chapter 21, R. S. 1909, relating to civil procedure—general code, and enacting 104 new sections in lieu thereof.

3. An Act amending Chapter 35, R. S. 1909, relating to courts of record, their general powers and duties, by the addition of two new sections thereto, in which the judge of any circuit or criminal court is authorized to hold special terms at any time when its business or the public good demands, upon reasonable notice given, and providing that no trial shall be terminated by the expiration of the term, but that such trial may be concluded or the case continued, in the discretion of the court.

1. Mr. White is a graduate of the School of Law, University of Missouri, and is now General Solicitor for the Missouri Pacific Railroad Company.—Ed.

4. An Act repealing 28 sections of Chapter 37, R. S. 1909, relating to criminal procedure, and enacting 35 new sections in lieu thereof.

5. An Act amending Sections 6345, 6355, 6356, 6359, 6364 and 6396 of Chapter 46, R. S. 1909, relating to Evidence.

6. An act providing for the appointment of three Commissioners for the St. Louis Court of Appeals, to serve for a term of 2 years.

7. An Act authorizing the Supreme Court to prescribe rules covering procedure in civil cases in courts of record in this state. This bill, as drafted by your comm'ttee and presented to the legislature, was as follows:

"Section 1. The Supreme Court shall have the power to prescribe from time to time, the forms and manner of service of writs and all other process; the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving process of all kinds; of taking and obtaining evidence; drawing up, entering, and enrolling orders; and generally to regulate and prescribe by rule the forms for the entire pleading, practice and procedure to be used in all actions, motions, and proceedings whatsoever in civil cases in all courts of record in this state, except county and probate courts.

"Section 2. When and as the rules of court herein authorized shall be promulgated, all laws in conflict therewith shall be and become of no further force and effect."

It will be noticed that the above bill is an almost exact copy of the Webb bill relating to procedure in the federal courts, heretofore introduced and for some time pending in Congress.

Of these proposed measures, two only were enacted by the legislature, to wit: the act relating to the disbarment of attorneys, and the act providing for the appointment of three Commissioners of the St. Louis Court of Appeals.

The bill relating to the disbarment of attorneys was emasculated to some extent in its passage through the legislature. This could not be prevented, but it is believed that the bill as finally passed is some improvement over the old law.

In addition to the above, the act creating a Supreme Court Commission was extended for another period of four years and the number of commissioners increased from four to six.

The other bills reached various stages in the legislative process, but suffice it to say they all failed of passage. Some opposition came from members of the legislature and persistent opposition was encountered to some of the bills from attorneys representing special interests, but it is believed that the primary reason for the failure of the legislature to enact these proposed measures was the lack of interest manifested by the lawyers of the state, generally, and their failure to co-operate with the Committee in their promotion.

As to the proposed measure authorizing the Supreme Court to formulate rules of procedure to take the place of the present civil code, so much opposition was manifested by the members of the legislature that this bill did not get beyond the initial stage of introduction and committee reference.

It cannot be asserted too often that if the Missouri Bar Association expects the General Assembly to enact its proposed measures relating to procedure, it will have to get unitedly behind the measures and continuously urge and promote their passage by a strong legislative committee remaining constantly at the scene of action. Experience has demonstrated the fact that an occasional visit to the legislature by one or more members of the Bar Association Committee, and formal presentations of the proposed measures before the several legislative committees, will not accomplish results. Unless the Association is willing to go about this matter in a business-like way, it had as well cease its efforts to secure from our General Assembly any substantial change, or amendments, of our present procedural law.

There was, however, considerable activity on the part of the legislature, upon its own initiative, with the following results touching procedure:

Amendments

Section 869, relating to arbitration, amended by eliminating the exception as to married women.

Section 2298, relating to bonds in attachment proceedings, amended by the addition of certain provisions. It is suggested, however, that this act is probably invalid on account of a defective title and a failure to comply with the provisions of Section 34, Article 4, of the constitution.

Section 2360, relating to condemnation proceedings by a corporation, amended so as to include oil, pipe-line and gas companies.

Sections 2512, 2513, 2514, and 2527, relating to injunctions, amended by taking from the probate courts the right to issue writs of injunction. It is presumed that this amendment was made for the purpose of harmonizing the statute with the ruling of the supreme court in the case of *State ex rel. v. Locker*, 181 S. W. 1001.

Section 1887, relating to the period of limitation in personal actions, amended by adding certain words of interpretation. It is suggested that Section 1 of this act is defective, but perhaps not fatally so.

Section 2998, relating to the notice required in proceedings to dissolve corporations, amended by the addition of a provision requiring the secretary to mail a copy of the application to all non-residents of the county.

Section 2996, relating to the voluntary dissolution of corporations,

amended by the addition of a provision to the effect that a dissolution may be effected in certain cases simply by the filing of an affidavit with the secretary of state.

Section 3882, relating to punishment by courts for contempt, amended by striking out all that part of the present section in which a limit is placed upon the punishment. This amendment was, presumably, made to meet a criticism by the supreme court in the case of *Railway vs. Gilder-sleeve*, 219 Mo. 170, and other cases.

Section ~~5316~~, specifying certain defects for which judgments shall not be reversed or persons discharged by writ of habeas corpus, is amended by striking out that part of the section relating to discharges under the habeas corpus act. The purpose of this amendment is not apparent unless it be to enlarge the power of appellate courts to discharge from custody on account of technical errors occurring in the lower courts.

Section 5549, relating to petitions for the establishment of drainage districts, amended by striking out the provision requiring the posting in the proposed district of notices of the presentation of the petition.

Section 6423, relating to the serving of notices to take depositions in proceedings to perpetuate testimony, is amended by eliminating the provision relating to married women.

Section 6445, relating to the serving of notice to take depositions in proceedings to establish land boundaries amended by eliminating the provision relating to married women.

Laws Repealed.

Section 2611, relating to appeals and writs of error in partition proceedings is repealed. The reason for repeal of this section is not known unless it be on the theory that the section was not necessary, in view of Section 2038, which is a general statute and evidently intended to cover appeals from the circuit court in all civil cases.

New Laws.

1. A new section, providing that in all cases in which a referee has been appointed and made report, the appellate court shall, on exceptions properly preserved, review the evidence and the findings of fact and conclusions of law of the referee and the trial court and give such judgment as shall be conformable to the law under the evidence. This statute has an emergency clause, wherein it is stated that there is now no adequate law governing appellate procedure in reference cases. (Acts of 1919, pg. 213.)

2. A new section, prescribing the time in which executions may be issued on judgments assessing benefits and damages in proceedings in-

stituted by cities for the purchase or condemnation of property for public uses. (Acts of 1919, pg. 221.)

3. A new section, providing that in all criminal cases the fact of a former acquittal or conviction of such defendant for the same offense may be shown under the general issue or plea of not guilty. (Acts of 1919, pg. 287.)

4. A new section, making it lawful for any blind person over the age of 18 to agree with his or her employer to waive his or her right to damage or compensation for personal injuries arising out of or in the course of his or her employment for an injury for which such blindness was the direct or contributing cause. (Acts of 1919, pg. 289.)

5. A new section, providing that in the trial of suits involving the title to real estate, the recitals in deeds conveying such real estate, and affidavits made in connection therewith and attached thereto, may be received in evidence under certain circumstances as the testimony of the person making such deed or affidavit. (Acts of 1919, pg. 289.)

6. Three new sections, providing for the taking of affidavits and depositions without this state of persons engaged in the naval or military service of the United States. (Acts of 1919, pg. 291.)

7. A new section, for the benefit of persons absent from the state and engaged in the military or naval service of the United States and extending "during the continuance of the present war and for the period of one year after peace is declared" the time limited by the laws of this state for the institution of legal proceedings. (Acts of 1919, pg. 492.)

8. A new section, prescribing the limitations within which actions by married women shall be brought for the recovery of real estate or any interest therein. (Acts of 1919, pg. 496.)

9. A new section, providing that as a condition precedent to the institution of a suit for damages against a city of the third class on account of injuries growing out of defective streets, side-walks or bridges, written notice to the mayor must be given within 90 days of the occurrence, and therein stating the place where the injury was received and the character and circumstances of the injury and that damages will be claimed from the city therefor. (Acts of 1919, pg. 568.)

10. A new section, prescribing in cities of over 300,000 inhabitants the time in which suits for damages arising from a change in the grade of streets and alleys shall be filed. (Acts of 1919, pg. 601.)

Respectfully submitted,

DAVID H. HARRIS,
JOHN M. ATKINSON,
ROBERT LAMAR,
HUGO MUENCH,
A. T. DUMM.

ST. LOUIS NOTES

A meeting of the St. Louis Bar Association was held at the Planters Hotel, Thursday evening, April 15th. The judges of the St. Louis Circuit were the guests of honor upon this occasion. An informal dinner was served at 6:30 p. m. Afterwards Honorable Albert J. Beveridge delivered the address. His subject was: "Marshall and the Constitution." This brilliant address covered a period of three hours, but to the end the large audience gave the speaker the most profound attention.

The St. Louis Bar Association has appointed committees to co-operate with the committees of the American Bar Association for the entertainment of the members who will attend the meeting of the American Bar Association which will be held at St. Louis, August 26th, 27th, and 28th.

A committee has been appointed by President Marion C. Early, of the St. Louis Bar Association, to report on the revision of the Missouri Constitution. The chairman of the Committee is Honorable Walter D. Coles, and the following members will act with him: Messrs. Joseph M. Bryson, Charles W. Bates, C. P. Williams and Lambert E. Walther.

President Early was authorized by the Executive Committee of the St. Louis Bar Association to appoint a committee of three to serve as a Committee on the Illegal Practice of the Law. This committee is distinguished from the Grievance Committee in that the Grievance Committee has jurisdiction over offenses committed by licensed attorneys, whereas the new committee will look after cases in which persons practicing law have not been licensed.

Another committee has been appointed, consisting of Guy A. Thompson, Forrest C. Donnell and W. L. Sturdevant, to draft a plan for the St. Louis Bar Association to express its approval or disapproval of the candidates for judicial office at the coming election.

W. SCOTT HANCOCK.

KANSAS CITY NOTES

Mr. Roy D. Williams, of Boonville, has moved to Kansas City and has become associated with the firm of Warner, Dean, Langworthy, Thomson & Williams.

Of the ten members of the circuit bench of Jackson County Judge Clarence A. Burney is the only bachelor. While he is penalized as a single man under the income tax laws, he contends that he will play even when the women get to vote.

John Milton Fox, for nearly forty years a member of the firm of Lathrop, Morrow, Fox & Moore, died on April 1st. Mr. Fox was a

Yale graduate. He stood very high as a lawyer and Christian gentleman. His is the first death in his firm since its organization.

Judge Latshaw, of the Criminal Court, is authority for the statement that Kansas City sends more criminals to the penitentiary than any other city in Missouri. Three-fourths of these, he says are transient persons. Kansas City produces about one-fourth of the entire number.

The Kansas City Bar Association held its thirty-first annual banquet on March sixth. Mr. Charles W. German, the President, presided. Mr. John S. Wright, the only local speaker, gave some interesting data concerning the courts of the state. Mr. John M. Zane, of Chicago, had a unique paper entitled "A Picaresque Maiden" (see dictionary), which was a most remarkable account of an adventuress and her exploits, marital and otherwise, in many lands. Judge Van Valkenburgh, an old time friend of Mr. Zane, in introducing him related a number of mutual college experiences which one would not ordinarily associate with the staid and dignified Federal Judge. Ex-Senator J. Ham Lewis, of Illinois, was one of the distinguished guests, and delivered a characteristic address.

The Kansas City Law School gave its fifteenth annual Washington Birthday dinner at the Baltimore Hotel on February 21st. With the exception of Judge John Dawson, of the Supreme Court of Kansas, the program was furnished by the students, who surprised their elders by the brilliancy of their addresses. Judge Dawson's subject was "The Three Parties to a Law Suit." The third party in this instance was the Supreme Court, and Judge Dawson gave in detail the course of a case in the Kansas Supreme Court after it had been argued and submitted. The Judge said it was not infrequent in writing an opinion that he would not state his own conception of the law of the case but would attempt to express the opinion of the majority of the court. This keeps out dissension.

The January meeting of the Kansas City Bar Association was addressed by Judge W. L. Huggins, the father of the bill creating the new Court of Industrial Relations of Kansas, and now a member of that court. Judge Huggins gave a thorough resume of the bill and the conditions leading to its enactment, which, as we all know, was brought about by the recent coal strike. In brief, the purpose of the bill is to prevent strikes by affording a judicial remedy for the troubles out of which strikes originate. The powers of the court are limited to industries involving the essentials of food, fuel and transportation. In addition to fixing the rate of wages, the court has the power to take over the operation of these various industries. In Judge Huggins' opinion the constitutionality of it will be sustained upon the broad grounds of public welfare and necessity.

Some years ago at the annual banquet of the Kansas City Bar Association Mr. John T. Harding, then of Nevada, who had recently been a candidate for the State Senate, responded to the toast, "The Country

Lawyer and The City Lawyer." Following the toastmaster's introduction, the genial John, then a stranger to most of the Kansas City Bar, who was inconspicuously seated with some convivial friends, filled with the spirit of the occasion, was literally lifted by them on to the table. From this somewhat prominent position was visible a gentleman, faultlessly attired, who, even then, supported a remarkably bald head. Apparently unembarrassed, he plunged into his subject. "Gentlemen," he said, "There are marked differences between the country lawyer and the city lawyer. One *bags* at the knee and the other *bags* at the belt. The first is a disciple of Saint Peter, the latter of Bacchus. But gentlemen, this is not all. Usually there is a political bee buzzing in the bonnet of the country lawyer. One got after me and I thought I was in it until after the first ballot at the nominating convention, when away went the bee, the buzz and the bang and left me a bald headed immune."

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LOCAL AND SPECIAL LEGISLATION

(concluded)

BY

ROSCOE E. HARPER

NOTES ON RECENT MISSOURI CASES



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LOCAL AND SPECIAL LEGISLATION IN MISSOURI UNDER THE CONSTI- TUTION OF 1875

(Continued from last issue)

Chapter V. A Study of the Cases Involving an Application of the Constitutional Limitations.

It was indicated in the preceding chapter that a general law relates to persons or things as a class; that this class is determined by a "distinguishing peculiarity" which bears a reasonable relation to the purpose for which the statute was enacted; and that this class includes all things which may come within it at any future time. It now remains to examine the cases in which this test has been applied.

In section fifty-three of article four of the constitution, as has been noted before, there are thirty-three subdivisions. Thirty-two of these subdivisions enumerate classes of subjects concerning which no local or special law shall be passed. In the thirty-second subdivision is found the general provision that "in all other cases where a general law can be made applicable, no local or special law shall be enacted." The effect of the enumeration of classes of subjects is to prohibit absolutely any local or special laws upon those matters. The effect of the general provision is to prohibit local and special laws in all cases where a general law, as determined in the last instance by the courts, can be made applicable; and to permit the enactment of local and special laws upon subjects other than those set out in the thirty-two subdivisions whenever a general law can not be made applicable, provided the formalities of section fifty-four of article four are complied with. The problem of classification, then, is the same under the enumerated list of subjects as under the general provision; and in the discussion of the cases arising under

section fifty-three, no classification of the decisions will be made. The enactment of local and special laws where a general law cannot be made applicable is taken up in connection with section fifty-four of article four of the constitution.

A. THE PROBLEM OF CLASSIFICATION.

The principle upon which a classification may be made depends upon the nature of the persons or things upon which the contemplated statute is intended to operate, and upon the purpose or object of the proposed statute for which the classification is made. The basis of classification may be made upon differences in population, geographical location,¹ magnitude, occupation, business, profession, sex, age, color and upon many other things, depending upon the purpose of the statute.

(1) *Classification by Population.*

Counties,² cities,³ and sometimes small units of local government,⁴ are classified by population for the purpose of leg-

1. A "geographical location" may be made a principle of classification so long as more than one unit may come within the class. For example, a law which applies "to all cities on the Mississippi River within ten miles of the Missouri River which have a population of over five hundred thousand inhabitants," is special because only one city could ever come within that classification. See *post* note 17.

2. *State ex rel Dickason v. County Court* (1895) 128 Mo. 427, 442, 30 S. W. 103 (an act disposing of the revenue from dramshop licenses in counties having a population less than fifty thousand inhabitants); *Ex Parte Loving* (1903) 178 Mo. 194, 207, 77 S. W. 508 (an act authorizing circuit courts in counties having a population of over 150,000 inhabitants to act as a juvenile court); *State ex rel Harvey v. Sheehan* (1916) 269 Mo. 421, 190 S. W. 864 (an act regulating the fees and duties of prosecuting and circuit attorneys in cities (construed as counties), which have a population of over five hundred thousand inhabitants). *State ex rel Cave v. Tincher* (1914) 258 Mo. 1, 166 S. W. 1028.

3. The classification of cities by population is discussed separately in Chapter VI, p. 17.

4. *State ex inf. Wright v. Morgan* (1916) 268 Mo. 265, 187 S. W. 54 (an act authorizing the consolidation of school districts having less than two hundred children of school age).

islation. There must always be "some distinguishing peculiarity which gives rise to a necessity for the law as to the designated class."⁵

The classification by population need not be based upon the total population of the unit of local government in question. In *State ex. inf. Wright v. Morgan*⁶ an act was upheld which authorized the consolidation of school districts having less than two hundred children of school age. Counties are sometimes classified according to the population of cities they may adjoin⁷ or contain.⁸ Such classification is valid so long as the principle upon which the classification is made bears a reasonable relation to the purpose of the statute.

Classification by population must have a prospective operation.⁹ The class should include in the future all units of local

5. *Ex Parte Loving* (1903) 178 Mo. 194, 209, 77 S. W. 508 (juvenile court law).

In *Dunne v. K. C. Cable Ry.* (1895) 131 Mo. 1, 5, 32 S. W. 641, MacFarlane, J., in upholding a jury law applicable to counties containing over fifty thousand and less than three hundred thousand population said (loc. cit. 5, 6); "~~There must be some distinguishing peculiarity which gives rise to a necessity for the law as to the designated class.~~"

"There also appears a reasonable necessity for the classification. The selection of juries under the general law, in counties containing large cities, is liable to much abuse. Complaint of the character of juries selected was common. The law was intended to correct this evil, and to do so the classification was deemed necessary."

6. (1916) 268 Mo. 265, 187 S. W. 54.

7. *State ex rel Barker v. Wurdeman* (1914) 254 Mo. 561, 163 S. W. 849 (an act creating an excise commission in counties having over seventy five thousand inhabitants which adjoin cities of five hundred thousand inhabitants or more).

8. *Dunne v. K. C. Cable Ry. Co.* (1895) 131 Mo. 1, 32 S. W. 641 (an act providing for the selection of petit jurors in counties containing cities over fifty thousand and less than three hundred thousand inhabitants).

9. *State ex rel Board v. County Court of Jackson County* (1886) 89 Mo. 237, 1 S. W. 307 (an act which provided that "in all counties of this state in which is located a city of over fifty thousand inhabitants..... is hereby established a reform school" was held invalid because it was "designed to operate in the present and on an existing state of facts"); *State ex rel Wiles v. Williams* (1910) 232 Mo. 56, 72, 133 S. W. 1 (an act was held invalid which regulated the salary of prosecuting attorneys "in all counties whose population, as ascertained by the United States census of 1900, is 32,000 inhabitants or over, and less than 50,000 inhabitants").

government of which the classification is made which attain the prescribed population; and it should exclude all former members of the class which so increase or decrease in population as to be no longer within the limits of the class.¹⁰ The classification is usually based upon the federal census taken every ten years,¹¹ but a special enumeration may be authorized during the intervening period.¹²

Some cases apply to a limited class of counties of a given population. In *State ex rel. Barker v. Wordeman*¹³ the class was composed of those counties of a given classification which adjoin a city of five hundred thousand inhabitants. The statute in that case created a board of excise commissioners and defined their duties in counties of the prescribed class. This classification can be justified only upon the ground that there is a reasonable necessity for such legislation with reference to counties having a population of seventy-five thousand inhabitants or more

10. *State ex rel Major v. Ryan* (1910) 232 Mo. 77, 133 S. W. 8 (an act regulating selection of petit jurors in counties having cities of over one and less than four hundred thousand inhabitants was held not to apply to Buchanan County after St. Joseph fell below one hundred thousand inhabitants in population in 1910).

11. *Dunne v. K. C. Cable Ry.* (1895) 131 Mo. 1, 7, 8, 32 S. W. 641. In this case it was contended that a jury law applying to counties having cities over fifty and less than three hundred thousand population "according to the last preceding national census" could not "apply to all counties of the designated class for the reason that it does not include such counties as may become entitled to its benefits between one census and another." The answer of the court to this was: "There must necessarily be in every case a period of more or less duration in which a county may in fact be entitled to the benefits of the law before they can enjoy them.....The census as a basis possesses the advantages of certainty in time and accuracy in manner, which are both difficult to secure when the work is committed to the local authorities of counties which are dominated by large cities."

12. *In Ex Parte Renfrew* (1892) 112 Mo. 591, 20 S. W. 682, the court upheld an act establishing a criminal court in Green county in 1889 under article six, section thirty-one which provided that "the General Assembly shall have no power to establish criminal courts, except in counties having a population exceeding fifty thousand," altho the federal census of 1890 as well as the one of 1880 showed a population less than fifteen thousand in Green county. The court said that the legislature having determined that there were over fifty thousand inhabitants in Green County when the law was enacted, this was sufficient.

13. (1913) 254 Mo. 561, 163 S. W. 849.

which adjoin cities of five hundred thousand population or more, that does not exist in counties having a population of seventy-five thousand inhabitants or more which do not adjoin cities of five hundred thousand inhabitants or over, or in counties having a population of less than seventy-five thousand inhabitants which may or may not adjoin a large city.

In *State ex. inf. Barker v. Southern*,¹⁴ an act which regulated the duties of highway engineer in counties containing more than fifty thousand inhabitants, whose taxable wealth exceeds forty-five million dollars or which adjoin or contain a city of more than one hundred thousand inhabitants, was upheld "for the reason that the counties which should fall within such a class would naturally have different or greater needs, corresponding to the differences between their condition and other counties of less population and less wealth." In all cases where more than one principle of classification is used the resultant classification must be justified under a reasonable necessity to avoid being objectionable as special legislation.

A classification is valid even tho there be only one member of the class provided that it includes all those units which may come into the class in the future, and is based upon a difference which bears a reasonable relation to the object of the act. In *State ex. rel. Barker v. Wordeman*¹⁵ an act was approved by two judges which applied to all counties of seventy-five thousand inhabitants or more adjoining a city of five hundred thousand in-

14. (1914) 265 Mo. 275, 177 S. W. 640.

15. (1913) 254 Mo. 561, 163 S. W. 849, Walker, J., (loc. cit. 575), "The fact that St. Louis county was at the time of said enactment the only county having a population of 75,000 or more, adjacent to a city (St. Louis) of 500,000 inhabitants, or more, and that said city was the only one in the state then having the designated population does not render the act obnoxious to the State Constitution in regard to special legislation. The act under its terms will apply with equal force in the future to other counties or cities which by increase in their populations may come within the purview of the statute."

Accord: *State ex rel Harvey v. Sheehan* (1916) 269 Mo. 421, 190 S. W. 864 (an act regulating the duties of prosecuting or circuit attorneys in cities which have a population of five hundred thousand or more, the court construing city to mean county.)

habitants or more although it applied only to one county at the time of its enactment.

Wherever there are two or more principles of classification, each distinction upon which the classification is based must bear a reasonable relation to the purpose of the statute for which the composite classification is made. The use of two or more principles of classification is susceptible to abuse unless each principle is scrutinized carefully, since it is possible to reduce any class to a few members if enough principles are used to eliminate the largest part of the class. In *Hays v. Milling Co.*¹⁶ is found a good example of this evil. In that case an act was held invalid which regulated the fees of the clerk of circuit courts in all counties which "constitute a separate judicial circuit with two judges of the circuit court and having no criminal court." This description applied to only one county in the state.

(2) Other Principles of Classification.

Any principle or combination of principles of classification is valid under the constitutional prohibition on special legislation so long as the distinction or distinctions upon which the classification is determined bears a reasonable relation to the purpose for which the classification is made. Classifications which are valid for one statute may be invalid as to others.

Counties, and other units of local government, may be classified by geographical location,¹⁷ assessed wealth,¹⁸ miles of

16. (1909) 227 Mo. 288, 126 S. W. 1051.

17. *State ex rel Barker v. Wurdeman* (1913) 254 Mo. 561, 163 S. W. 849 (an act creating an excise commission in all counties having a population of over seventy-five thousand inhabitants, adjoining a city of five hundred thousand inhabitants); *State ex rel Kinsey v. Messerly* (1906) 198 Mo. 351, 355, 95 S. W. 913 (an act held invalid which regulated fees of justices of the peace in cities having a population of fifteen thousand and under thirty-five thousand inhabitants, lying wholly within one township, Sedalia being the only city.) A good example of classification by geographical location would be: "all cities on a river or seashore." A law based upon a geographical classification which could never apply to more than one locality does not because of such classification lose its special and local character. See note 1, page 4.

18. *State ex inf Barker v. Southern* (1915) 265 Mo. 275, 177 S. W. 640 (an act regulating duties of highway engineer in counties contain-

macadamized and graveled roads,¹⁹ or upon any other distinction that bears a reasonable relation to the purpose of the act.

The question of the validity of a classification frequently arises in connection with the exercise of the police power. Laws promoting the general welfare, convenience, health, safety and comfort of the state or community are frequently attacked upon the ground of special legislation. Laws applying to corporations,²⁰ railroads,²¹ insurance companies,²² industries,²³ hours

ing over fifty thousand inhabitants, whose taxable wealth exceeds forty-five million dollars or which adjoin or contain a city of more than one hundred thousand inhabitants.)

19. *State ex rel Garrett v. Arnold* (1896) 136 Mo. 446, 38 S. W. 640 (an act authorizing a higher rate of taxation for road improvements in "all counties wherein the assessed valuation of property is fifteen million dollars or more, and wherein there are more than one hundred and fifty miles of macadamized and graveled roads.")

20. *Julian v. K. C. Star* (1908) 209 Mo. 35, 107 S. W. 496 (upholding an act which authorized suits for libel against a newspaper corporation in any county of the state where the paper circulates in which neither plaintiff nor defendant resided.) This case was subsequently overruled in *McClung v. Pulitzer Pub. Co.* (1919) 214 S. W. 193 in which McBaine, Special Judge, said (loc. cit. 196): "So, then, we conclude that since the decision in *Houston v. Pulitzer Publishing Co.*, 249 Mo. 332, 155 S. W. 1068, decided April 8, 1913, this court has been of the opinion that the legislature has not the authority under the state and federal constitutions to provide that the venue in libel suits shall be that the individual charged with libel may only be sued in the county where he resides, or where the plaintiff resides if the individual is there found, but that in the case of a corporation charged with libel the corporation defendant may be sued in a county in this state where neither the action accrued nor the corporation has its domicile or agent for the transaction of business, and that the legislature may not provide that a citizen of the state, who is plaintiff in a libel suit, can sue a corporate defendant charged with libel in the county where the citizen resides, while a citizen, as plaintiff, who charges an individual defendant with committing a libel, cannot sue the defendant in the county in which the plaintiff resides, unless the individual defendant shall be found in the county where the plaintiff resides."

21. See *post* p. 11.

22. *Daggs v. Ins. Co.* (1896) 136 Mo. 382, 38 S. W. 85 (an act upheld which denied the right to fire insurance companies of showing that the property insured was worth less at the time of issuing the policy than the full amount insured); *State ex inf. Crow v. Aetna Ins. Co.* (1899) 150 Mo. 113, 51 S. W. 413 (holding an act valid prohibiting combinations fixing rates of fire insurance in the state except in cities having a population of over one hundred thousand inhabitants); *Jenkins v. Ins. Co.* (1902) 171 Mo. 375, 71 S. W. 688 (upholding an act depriving

and conditions of labor,²⁴ occupations,²⁵ and other classes of persons, things, or acts,²⁶ in the state are upheld if there is a reasonable relation between the distinction upon which the classification is based and the object of the statute.

old line insurance companies of defense of misrepresentation unless the matter misrepresented contributed to the event on which the policy was payable); *Claudy v. Royal League* (1914) 259 Mo. 92, 168 S. W. 593, (upholding an act excepting fraternal beneficiary associations from the provisions of the insurance laws including the act denying defense of suicide to insurance companies.)

23. *Hamman v. Coke Co.* (1900) 156 Mo. 232, 56 S. W. 1091, Burgess, J., upholding an act authorizing the recovery by the wife of ten thousand dollars for the death of her husband, a miner, caused by the negligence of defendant mine operator in the course of his employment, altho the statute allowed the recovery of a maximum of five thousand dollars in all other cases, said (loc. cit. 241): "It is common knowledge that no class of laborers are so much exposed to dangers as miners, and that none in proportion to the number engaged meet with so many fatal disasters, and the legislature doubtless for that reason, in order to protect human life, and to prevent such occurrences so far as possible, thought that the necessity for increasing the maximum amount of damages over that fixed by law in other cases existed, in order to stimulate operators of such mines to all needful and proper precaution for their protection."

24. *State v. Whitaker* (1900) 160 Mo. 59, 70, 60 S. W. 1068 (upholding an act requiring screens for the protection of motormen on street electric railways and not applying to tramways propelled by other means); *State v. Cantwell* (1903) 179 Mo. 245, 78 S. W. 569 (holding valid an eight hour law for miners); *Hawkins v. Smith* (1912) 242 Mo. 688, 147 S. W. 1042 (holding valid a law abolishing the defence of negligence of a fellow servant in an action against a mine operator for personal injury to a miner); *State v. Miksicek* (1909) 225 Mo. 561, 125 S. W. 507 (holding invalid an act prohibiting work in bakeries over six days per week and regulating the construction of bakeries so as to obtain light and air.)

25. *Ex Parte Lucas* (1900) 160 Mo. 218, 61 S. W. 218 (an act regulating the occupation of barbering in cities having a population of over fifty thousand inhabitants); *State v. Weber* (1908) 214 Mo. 272, 113 S. W. 1054 (upholding an act requiring peddlers of certain goods to have a license.)

26. *State v. Bockstruck* (1896) 136 Mo. 335, 354, 38 S. W. 317 (an act prohibiting the sale of imitation butter); *State v. Gritsner* (1896) 134 Mo. 512, 528, 36 S. W. 39 (an act forbidding "dealing in options"); *Ex Parte Berger* (1905) 193 Mo. 16, 90 S. W. 759 (upheld an act which punished the receiving of interest in excess of two per cent per month, the legal rate of interest being eight per cent); *Spithover v. Bldg. & Loan Ass'n.* (1909) 225 Mo. 660, 125 S. W. 766 (upholding an act permitting building and loan associations to collect from members the equivalent of a rate of interest above the legal rate, thru premiums, fines, and interest); *White v. Railroad* (1910) 230 Mo. 387, 130 S. W. 325 (an act held

Laws applying to railroads have long been upheld as proper altho such laws do not apply to all corporations or all common carriers. In *Humes v. Mo. Pac. Ry.*²⁷ an act was upheld which allowed double damages to be recovered against a railroad for the killing of stock in consequence of a failure to fence the right of way.²⁸ This was a valid exercise of the police power.²⁹

The constitutionality of acts making classifications is frequently attacked under the provisions in the state constitution

valid which prohibited a garnishment of the wages of employees of railroads in actions for sums less than two hundred dollars before final judgment had been recovered against the employee); *Bank v. Clark* (1913) 252 Mo. 20, 158 S. W. 597 (upholding an act restricting the right of protest for street improvements to resident owners of abutting property); *State v. Iron & Steel Co.* (1916) 268 Mo. 178, 186 S. W. 1007 (upholding an act regulating the sanitary conditions of foundries employing more than ten men.)

27. (1884) 82 Mo. 221, 230.

28. Accord: *Dent v. Railroad* (1884) 83 Mo. 496 (holding valid an act which conferred jurisdiction upon justice of the peace courts of cases against railroads for stock killed due to a failure to fence the right of way); *Kingsbury v. Railroad* (1900) 156 Mo. 379, 57 S. W. 547 (allowing double damage to be recovered against the railroad whose failure to maintain a good fence along the right of way caused injury to crops.)

29. *Perkins v. Railroad* (1890) 103 Mo. 52, 15 S. W. 320, Black, J., in upholding an act which allowed a reasonable attorney's fee to a successful plaintiff in an action against a railroad for the killing of live stock at places on the right of way not enclosed by a good fence, said (loc. cit. 57): "Our statute giving the owner double damages for stock killed where a railroad is not fenced as required by law, has been upheld in several cases on the ground that the law is a police regulation and designed not only to protect the owners of the stock, but also the traveling public, and that the legislature might impose a penalty for a violation of the law and give the penalty to the owner of the stock killed. *Barrett v. Railroad*, 68 Mo. 56, and cases cited; *Cummings v. Railroad*, 70 Mo. 570; *Speelman v. Railroad* 71 Mo. 434; *Humes v. Railroad*, *supra*. The statute in question is as much a police regulation as is the double damage section; and the attorneys' fee may be lawfully imposed as a penalty for the violation of the law. It is a penalty allowed in all cases of a class, and the objection that the law is special legislation is not well taken." Affirmed in *Briggs v. Railroad* (1892) 111 Mo. 168, 172, 20 S. W. 32. *Powell v. Sherwood* (1901) 162 Mo. 605, 617, 63 S. W. 485 (upholding an act abolishing the defense of the negligence of a "fellow servant" in an action against a railroad by an employee for personal injuries); *Sams v. Railroad* (1902) 174 Mo. 53, 73 S. W. 686 (holding that act abolishing defense of "fellow servant" by railroads was not special because it did not apply to street railways); *State v. Railroad* (1912) 242 Mo. 339, 147 S. W. 118 (upholding an act which required corporations to pay employees at least twice each month.)

against special legislation and under the Fourteenth Amendment of the Constitution of the United States requiring equal protection of the laws. An act objectionable under the Fourteenth Amendment of the Constitution of the United State is objectionable under the State Constitution as special legislation. But the converse is not true as is pointed out in another place. The scope of this study does not permit a full discussion of all the problems of classification, especially the problems of classification arising under the exercise of the police power.³⁰

It is sometimes said that the "mere form of legislation

30. In the following cases the acts were held special and unconstitutional: *State v. Julow* (1895) 129 Mo. 163, 176, 31 S. W. 781 (an act forbidding the discharge of an employee because he belongs to the union was held special because it did not protect non-union men from being discharged); *State v. Granneman* (1896) 132 Mo. 326, 33 S. W. 784 (an act forbidding the carrying on of barber business on Sunday); *In re Flukes* (1900) 157 Mo. 125, 57 S. W. 545 (prohibiting a resident creditor from garnishing the wages of a resident debtor in another state because it prevents a right of garnishment abroad that might be exercised at home); *State ex inf. Hadley v. Washburn* (1901) 167 Mo. 680, 67 S. W. 592 (holding invalid an act requiring the governor in appointing a board of three election commissioners in cities having over one hundred thousand inhabitants to select one from the leading party opposed to the governor from three candidates nominated by the party committee of the city for which the board is appointed); *Moler v. Whisman* (1912) 243 Mo. 571, 147 S. W. 985 (holding invalid an act which forbade barber colleges from displaying a barber pole and prohibited apprentices or students from charging for their services); *State v. Walsh* (1896) 136 Mo. 400, 406, 37 S. W. 1112 (an act prohibiting pool selling and book making in any place except upon the premises of a regular race course was held invalid because there was no reasonable basis for distinguishing pool selling and bookmaking off the premises from the same acts upon the premises of a regular race course). Affirmed: *State v. Thomas* (1896) 138 Mo. 95, 100, 39 S. W. 481. The decisions in these cases were later obviated by an act which required that bookmakers should be licensed at race courses by the auditor of the state. *State v. Thompson* (1900) 160 Mo. 333, 346, 60 S. W. 1077. *State v. Buchardt* (1898) 144 Mo. 83, 46 S. W. 150 (holding an act unconstitutional which punished petit larceny by a heavier penalty in St. Louis than elsewhere in the state.)

State v. Kring (1881) 74 Mo. 612, 622 (an act which regulated the selection of special judges in the criminal court of St. Louis held invalid as a special act regulating the practice and procedure in judicial proceedings); *State v. Baskowits* (1913) 250 Mo. 82, 156 S. W. 945 (holding invalid an act requiring the written consent of the owner of certain kinds of bottles which bear a trade name to be obtained by dealers of the same).

without regard to its operation will not suffice to relieve it of its special or local character. If in its practical operation it can only apply to particular persons or things of a class then it will be a special or local law, however its character may be concealed by form of words." ³¹ This means that the validity of a classification with respect to a given law is determined by its operation and not by its form; and that the classification as it actually works out must be based upon a difference which bears a reasonable relation to the object of the statute. And in the same case from which the above quotation was taken, *Dunne v. K. C. Cable Ry.*, a further statement is made in support of this view: "If the classification is a proper one, the law will not be special or local, tho at the time only one object falls within the class, provided the law has such a prospective application as to include all objects that may, in the future, become entitled to the benefits or powers conferred by the law." ³²

The General Assembly cannot create a classification upon differences in counties which differences exist by reason of an act of the legislature. To uphold such laws would be to permit the legislature to enact special laws indirectly by creating or destroying the distinctions upon which the classifications are based. In *State ex. inf. Barker v. Southern* ³³ an act was held invalid which regulated the duties of the county surveyor in all counties which contain two hundred and less than four hundred thousand inhabitants, and which contain one hundred and fifty miles or more of macadamized roads outside of municipal corporations, "which pay to the county surveyor a salary of three

31. *Dunne v. K. C. Cable Ry.* (1895) 131 Mo. 1, 5, 32 S. W. 641.

32. (1895) 131 Mo. 1, 6, 32 S. W. 641. In this case an act providing for the selection of the jury in counties which had a city containing more than fifty and less than three hundred thousand inhabitants was upheld altho only two counties came under the provisions of the act at the time of its enactment.

33. (1915) 265 Mo. 275, 177 S. W. 640. Accord: *Hays v. Mining and Milling Co.* (1909) 227 Mo. 288, 126 S. W. 1051. (An act regulating fees of clerk of circuit court in all counties which "constitute a separate judicial circuit with two judges of the circuit court and having no criminal court"); affirmed: *Bridges v. Holdout Mining Co.*, 252 Mo. 53, 158 S. W. 579.

thousand dollars or more annually." In this case the legislature could include or exclude a county which otherwise would come within the class changing the pay of the county surveyor. The court based its decision upon the ground that no other county or counties could come within the class as the classification is based upon an existing state of facts. A classification based upon a distinction which derives its existence from an act of the legislature is necessarily a classification based upon an existing fact.

B. ENACTMENT OF LOCAL AND SPECIAL LAWS.

(1) *In Pursuance of a Provision of the Constitution.*

A local or special act passed in pursuance of a specific constitutional provision is valid. The prohibition against local and special legislation does not apply to such acts. An act which appoints the times and places for the holding of circuit courts in a designated judicial district is not invalid,³⁴ altho special and local, since the constitution provides that the circuit court "shall hold its terms at such times and places in each county as may be by law directed."³⁵ In *Ex Parte Renfrow*³⁶ an act was upheld which created a criminal court in Green County under section thirty-one of article six of the constitution which provided: "The General Assembly shall have no power to establish criminal courts except in counties having a population exceeding fifty thousand." Wherever the constitution authorizes the passage of a law it is not invalid if local or special.³⁷

34. *State ex rel Hughlett v. Hughes* (1891) 104 Mo. 459 (an act providing for the times and places of holding circuit courts in Audrain, Pike, Lincoln, and Montgomery counties); affirmed: *State ex rel Younger v. Stratton* (1896) 136 Mo. 423.

35. Const. of 1875, Art. VI, Sec. 22.

36. (1892) 112 Mo. 591, 598, 20 S. W. 682; affirmed: *State ex rel Donhan v. Yancey* (1894) 123 Mo. 391, 27 S. W. 380; *State v. Etchman* (1905) 189 Mo. 648, 88 S. W. 643. But an act which imposes duties upon any judge of a criminal court not a part of that office, as an act requiring the judge of the criminal court of Buchanan county to sit, when called upon, over courts in any circuit in the state trying civil and criminal cases, is unconstitutional. *State v. Hill* (1898) 147 Mo. 63, 47 S. W. 798; *Ashbrook v. Schaub* (1900) 160 Mo. 107, 110, 160 S. W. 107.

37. In the following cases local and special acts were upheld under

(2) Under Section Fifty-Four.

It is provided in section fifty-four of article four that "no local or special law shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected is situated."³⁸ It is required that the notice shall state the substance of the contemplated law, and be published at least thirty days prior to the introduction of the bill in the legislature.

In *Todd v. Reynolds*³⁹ a local and special act, which pro-

a specific provision in the constitution authorizing such legislation: *Kenefick v. St. Louis* (1895) 127 Mo. 1, 29 S. W. 838 (an act limiting the compensation of the sheriff in the city of St. Louis to ten thousand dollars under Art. IX, Sec. 13, Const. of 1875, which provided that "the fees of no executive or ministerial officer of any county or municipality,shall exceed the sum of ten thousand dollars for any one year"); *State ex inf. Atty. Gen. v. Dobbs* (1904) 182 Mo. 359, 365, 81 S. W. 1148 (an act providing for an additional circuit judge in Jasper county); *Coffey v. Carthage* (1906) 200 Mo. 616, 98 S. W. 562 (an act in relation to the twenty-fifth judicial district dividing the court into two divisions and providing for two judges); *State ex rel Judah v. Fort* (1908) 210 Mo. 512, 109 S. W. 737 (an act creating two divisions for the Criminal Court of Jackson County). *State ex rel Lionberger v. Tolle* (1880) 71 Mo. 645 (an act requiring judges of circuit courts in cities having a population of one hundred thousand inhabitants or more to award to the newspaper which is the lowest bidder all legal notices was upheld under Art. VI, Sec. 27, of the Constitution which provided that the judges of the circuit court of St. Louis "may sit in general term-----for the transaction of such other business as may be provided by law"); *State v. Brown* (1880) 71 Mo. 454 (an act adding Cairo township to the jurisdiction of the common pleas court of Moberly upheld under section five of the schedule of the Constitution which provided that all courts of common pleas shall continue to exist and exercise their present jurisdiction until otherwise provided by law).

38. Article IV, Section 54, Const. of Mo., provides as follows:

"Sec. 54. *Local and special laws, notice of.*....No local or special law shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least thirty days prior to the introduction into the General Assembly of such bill, and in the manner to be provided by law. The evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed, and the notice shall be recited in the act according to its tenor."

39. (1917) 199 S. W. 173. The same act was upheld in a previous case, *Lampel Land Co. v. Spellings* (1911) 236 Mo. 33, 139 S. W. 347.

vided that the "Chas. H. Groom Abstracts," relating to and affecting the titles of real real estate in Taney county, "shall be received as *prima facie* evidence of the matter and entries therein contained, in all courts and places in this state,"⁴⁰ was upheld under section fifty-four of article four, all of the formalities required by this section being complied with. This act was held not to be in contravention of section fifty-three of article four of the constitution. It was not in conflict with the subdivisions enumerating prohibited subjects of special legislation. Neither was it regarded as being in conflict with the provision that no local or special law shall be passed where a general law can be made applicable. The necessity for the special act in this case was the loss of all records and abstracts of the conveyance of real estate in Taney county in the destruction of the court house of Taney county in 1885, except the "Chas. H. Groom Abstracts."⁴¹

A local or special law upon any of the enumerated subjects in section fifty-three, concerning which local and special laws are forbidden, does not become valid by reason of enactment in pursuance of the provisions of section fifty-four;⁴² and section fifty-four does not authorize the enactment of a local and special law where a general law could have been made applicable.⁴³ Section fifty-four merely provides a method whereby those local and special laws which are not upon subjects forbidden by section fifty-three, or upon a subject which a general law could not have been made applicable, may be enacted.

40. *Missouri Laws*, 1905, p. 148.

41. In 1907 a general law making abstract of titles competent evidence wherever the official records had been destroyed was passed. *Missouri Laws*, 1907 p. 271. The soundness of the decision in *Todd v. Reynolds*, it is submitted, depends upon whether a general law could have been made applicable. Apparently the court accepted the determination by the legislature of this question as reasonable.

42. *State v. Kring* (1881) 74 Mo. 612, 623.

43. *Todd v. Reynolds* (1917) 199 S. W. 173, Railey, C., (loc. cit. 175): "Section 54 of the above article of our Constitution clearly contemplates that a local or special law may be passed by complying with its provisions, provided it does not contravene any of the provisions of section 53, *supra*."

If a local or special act has been enacted under the provisions of section fifty-four, it can be amended only by compliance with all the formalities required in the first instance.⁴⁴ But such an act may be repealed, it seems, without complying with the requirements of section fifty-four.⁴⁵ If a local act is passed in compliance with section fifty-four, and also in pursuance of a grant of power conferred upon the legislature by the constitution, such law may be amended as any other law since the compliance with section fifty-four was unnecessary. The validity of the law depends upon the specific grant of power by the constitution, and not because of compliance with section fifty-four.⁴⁶

Chapter VI. Classification of Cities.

A. CLASSIFICATION OF CITIES AUTHORIZED BY THE CONSTITUTION.

(1) *The Four Classes of Cities Organized Under General Laws.*

Cities may be properly classified for the purposes of regulation by general laws upon the basis of population. The justification for such classification lies in the difference of needs of

44. *Ashbrook v. Schaub* (1901) 160 Mo. 107, 110, 60 S. W. 1085.

45. In *Todd v. Reynolds* (1917) 199 S. W. 173 it was contended the subsequent general act, mentioned in note four, repealed the local and special act. It was held that the general act did not repeal the special act, but it was intimated that the Legislature could have repealed the special act.

46. *State ex rel Donhan v. Yancy* (1894) 123 Mo. 391, 27 S. W. 380. The act involved in this case was an amendment to an act creating a criminal court in Greene county. The original act complied with all the requirements of section fifty-four, but the amendment did not. The amendment was sustained, however, under section thirty-one of article six which authorized the legislature to establish criminal courts in counties having a population of fifty thousand inhabitants or over. In delivering the opinion of the court, Burgess, J., said (loc. cit. 401): "The fact that notice was given of the intended application to the legislature for the passage of a law creating the court in question and of a court similar in all respects in Buchanan county did not change the law and was in all probability done thru an abundance of caution, certainly not because it was a necessary prerequisite."

cities of different population, and in a similarity of problems in the cities of the same size. Laws applicable to the creation of an organization and of powers in a small town are unsuited to perform a similar function for the government of large cities; but cities of the same size have so much in common that general laws defining their powers and organization are recognized as adequate to their similar needs.¹

The classification of cities is authorized and required by the Constitution of Missouri. Section seven of article nine reads: "The General Assembly shall provide, by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the powers of each class shall be defined by general laws, so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. The General Assembly shall also make provision, by general law, whereby any city, town or village, existing by virtue of any special or local law, may elect to become subject to and be governed by the general laws relating to such corporations."

The Legislature, acting under this constitutional mandate, in the first session after adoption of the Constitution of 1875, divided the cities and towns of Missouri into four classes.²

1. Dillon, *Mun. Corp.*, Secs. 147-151.

2. *Missouri Laws*, Twenty-ninth Session (1877), p. 41. All cities containing one hundred thousand inhabitants or more constituted the first class; all cities containing twenty and less than one hundred thousand, the second class; all cities and towns containing five and less than twenty thousand, the third class, and all cities and towns containing five hundred and less than five thousand inhabitants constituted the fourth class. The *Missouri Laws* of 1885, p. 50, changed the division between the second and third classes from twenty to thirty thousand inhabitants. Subsequently the dividing line between the third and fourth classes was changed from a population of five to three thousand inhabitants. R. S. 1889, Secs. 974, 975. This amended classification still holds today (R. S. 1909, Secs. 8524-8527) with the addition that all unincorporated towns containing less than five hundred are declared villages (R. S. 1909, Sec. 8528); and with the provisions that all incorporated towns under five hundred inhabitants which shall so elect shall be cities of the fourth class (R. S. 1909, Sec. 8527), and that all cities containing more than seventy-five and less than one hundred fifty thousand inhabitants may become a city of the first class upon a vote at a special election (R. S. 1909,

Laws defining the powers and organization of the cities of each class have been passed and there is no question of their constitutionality. It is with laws concerning the powers of cities which do not comply with this classification and which are not coextensive with the limits of a given class that the question of constitutionality most frequently arises.

It will be noted that the constitutional provision requiring the classification of cities provides that the general assembly shall provide for the organization and define the "power of each class" by general laws, and that all the cities "of the same class shall possess the same powers and be subject to the same restrictions."³ The effect of this provision has been not only to produce uniformity of organization and powers within each class of cities, but also to set apart each class from the others by well defined limits. Thus a law which grants a power to any one of the four defined classes of cities is recognized as general and valid even tho there may be no reasonable distinction between the cities of the favored class from the cities in any other class with respect to the power granted.⁴ On principle such a

Secs. 8535-8536). The latter provision which was applicable to St. Joseph alone at the time was upheld in *State ex rel Halsey v. Clayton* (1909) 226 Mo. 292, 126 S. W. 506, on the ground that the statute merely provided a different method by which cities having over seventy-five and less than one hundred thousand inhabitants could become members of the first class. Those over one hundred thousand inhabitants had to become members of the first class whether they so chose or not.

3. Const. of Mo., Art. IX, Sec. 7.

4. *Copeland v. St. Joseph* (1894) 126 Mo. 417, 429, 29 S. W. 281; Dillon, *Mun. Corp.*, Sec. 151. In *Copeland v. St. Joseph* the court held an act which authorized cities of the second class to extend their limits, with the proviso that land in lots of three acres or more devoted to agricultural purposes should be exempted from municipal taxation when thus included within the extended boundaries was not objectionable because the proviso was limited in operation to cities of the second class. The words of Gantt, P. J., who delivered the opinion of the court, are as follows: (loc. cit. 429)

"In view of all this contemporaneous legislation showing conclusively that the legislature has not hesitated to confer upon cities of all grades this power of self-extension without attempting to exempt such lands, counsel for respondent argues that there is little left upon which to base a presumption that the legislature would have denied the power to cities of the second class, unless the *proviso* had been inserted in the act. We confess we can see no reason why this power should be denied

law would be valid only when based upon a classification arising out of a reasonable necessity; but laws relating to the organization and powers of a class of cities are not so tested.⁵

Those acts, however, which do not provide for the organization and powers of cities of a given class, are not necessarily general because they apply to all cities of one of the recognized classes. Such acts are general only when the class to which they apply is determined by a reasonable distinction which relates directly to the object of the statute. Neither are these acts required to follow the lines of classification of the four general classes of cities; nor are such acts invalid when they split a class in violation of the requirement that all powers of each class shall be the same.⁶

one class of cities and be conferred upon all others. In either case it subjects the property so taken in, to municipal taxation.

"On the other hand, it cannot be doubted that the legislature had the unquestioned right to withhold the power of extension altogether, and necessarily the right to annex the conditions upon which it would confer the power, and the very fact that it granted the right to all other cities, and denied it to cities of the second class refutes the presumption that the proviso was immaterial or inadvertent."

5. *State ex inf. Att'y. Gen. v. Fleming* (1898) 147 Mo. 1, 13, 44 S. W. 758 (an election law applicable to cities of the fourth class upheld altho it virtually did away with the Australian ballot law as to elections in cities of the fourth class for extension of boundaries). See Dillon Mun. Corp. Sec. 151.

6. In *Calland v. Springfield* (1914) 264 Mo. 296, Loc. cit. 302, 174 S. W. 396, Bond, J., in upholding a tax rate in those cities having over thirty thousand inhabitants which were in the third class, at a higher rate than was permitted in cities of the third class having less than thirty thousand inhabitants, under authority of Article X, section eleven of the Constitution said:

"The other section (Art. 9, Sec. 7) after referring to the Legislature the duty of providing 'for the organization and classification of cities and towns' and limiting these to four, adds, to-wit:

"'And the powers of each class shall be defined by general laws, so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions.'"

"This general language of the Constitution is necessarily referable to the objects had in view, that is the *organization* and division of all cities and towns into four classes. Therefore in providing that when thus classified they should have similar powers and be under similar restrictions, the Constitution plainly referred to the constituent agencies and governmental functions which necessarily composed 'the organization' of the cities and towns as a body politic under a particular class."

A law which grants powers to cities of a given class and provides that any city of the class may exercise the power upon election to do so, either by the voters or officials of the city, is general in nature.⁷ It is a form of the local option acts discussed in another place. Neither is such an act invalid under the requirements that all cities of the same class shall have the same powers and be subject to the same restrictions.⁸ In *Owen v. Baer*,⁹ three judges of a divided court held a local option drainage and sewer act for cities of the third and fourth class unconstitutional on the ground that it created "a dissimilarity in the powers of the cities of the fourth class." It was contended that cities which accepted the provisions of the act had greater powers than those which rejected its provisions. Since this view was not the view of a majority of the court in *Owen v. Baer*, the court in *Hall v. Sedalia*¹⁰ did not hesitate to repudiate this theory in holding that a local option sewer law for cities of the third class was constitutional.

(2) Cities Operating Under Special Charters.

The question arose a few years after the adoption of the Constitution of 1875 as to the validity of legislation applying to cities operating under special charters. It was held in *Rutherford v. Heddens*¹¹ that a law which authorized cities operat-

7. *Barnes v. Kirksville* (1915) 266 Mo. 270, 180 S. W. 545 (an act providing commission form of city government for cities of the third class selecting it).

8. *Hall v. Sedalia* (1910) 232 Mo. 344, 134 S. W. 650. Ferriss, J., in giving the opinion of the court, said (loc. cit. 352): "The act in question is complete in itself, and is uniform in its application to cities of the third class, comprehends all cities of that class. Whether the law shall come into operation in any particular city depends upon a contingency, namely, an affirmative vote of the people of such city. But this applies to each and every city of the class. The law extends the same right, the same privilege, to each city in the class, and is therefore uniform. It is, in the language of the Constitution, a 'general' law, and under it all the cities of the same class, as required by the Constitution, possess the same powers and are subject to the same restrictions."

9. (1900) 154 Mo. 434, 55 S. W. 644.

10. (1910) 232 Mo. 344, 352, 134 S. W. 650.

11. (1884) 82 Mo. 388. Affirmed in *Rutherford v. Hamilton* (1888) 97 Mo. 543, 11 S. W. 249. The act involved authorized the cities in the class designated to establish a system of sewerage.

ing under special charters that contained more than thirty and less than fifty thousand inhabitants to establish a sewer system was general and constitutional. Thus was recognized a fifth class of cities, namely, those operating under special charters. Also as a further result of *Rutherford v. Heddens*, laws which apply only to a portion of the cities operating under special charters may be held to be general.¹² It is believed that legislation for sub-classes of the general class of cities with special charters is valid only when such sub-classification rests upon a reasonable difference that relates to the object sought by the statute for which the sub-classification was made.

(3) *Cities with "Home Rule" Charters.*

Other constitutional provisions which have given rise to two separate classifications of cities are contained in article nine. Sections sixteen and seventeen provide for the adoption by cities having more than one hundred thousand inhabitants of their own charters; and section twenty and the following sections in article nine provide a method by which St. Louis alone may adopt its own charter. Under these sections acts applying to St. Louis or the other "home rule" cities are upheld on the theory that two new classes of cities are created; one class composed of all "home rule" charter cities except St. Louis, and the other class composed of St. Louis alone.¹³

Statutes which designate St. Louis directly by name, or in-

12. *Kelly v. Meeks* (1885) 87 Mo. 396 (an act authorizing cities with special charters having more than twenty and less than two hundred and fifty thousand inhabitants to extend their limits): *Elling v. Hickman* (1902) 172 Mo. 237, 72 S. W. 700 (an act authorizing the organization of special road districts of territory in which were cities of the third and fourth classes except those cities of the third class having special charters). In *Elting v. Hickman*, Burgess, J., said (loc. cit. 256): "It is therefore plain that cities which retain their special charters do not belong to either of the classes provided for by the Constitution. altho they may have the requisite number of inhabitants to become such, unless they first elect to do so."

13. *Kansas City v. Stegmiller* (1899) 151 Mo. 189, 52 S. W. 723. Gantt, C. J., in delivering the opinion of the court, said (loc. cit. 204): "Again we think it is plain that the framers of the Constitution *ex vi termini* excluded from its legislative classification the City of St. Louis,

directly by classification as "all cities having a population of over five hundred thousand inhabitants,"¹⁴ are upheld on the theory that St. Louis under the constitutional provisions constitutes a separate class. If St. Louis were not recognized as constituting a separate class to herself then such laws relating to the powers and organization of cities over five hundred thousand would be invalid under the constitutional provision that all cities of the same class should possess the same powers and be subject to the same restrictions. Such statutes, however, as define the powers and organization of the city of St. Louis, directly or indirectly, must be based upon the peculiar needs of St. Louis, as distinguished from the needs of other cities having home rule or of the first class. The "home rule" cities and St. Louis are recognized as separate classes, it is submitted, only when there is a reasonable necessity for such classification. The validity of laws concerning St. Louis alone designated directly or indirectly, are tested by the same requirement that there must be a reasonable necessity for such classification to accomplish the object of the statute.

In *Murnane v. St. Louis*¹⁵ an act which regulated the assessment for street improvements in cities having more than three

which it expressly authorized to adopt its own scheme and charter, and all such cities as it authorized by Section 16 Article IX, to frame and adopt their own charters. These cities constitute two constitutional classes distinct from those chartered and classified by the legislature."

The cases in the Supreme Court of Missouri upon this question are reviewed in McBain, Law and Practice of Municipal Home Rule, pp. 118-171.

14. In *State ex rel Hawes v. Mason* (1899) 153 Mo. 23, 54 S. W. 524, Gantt, C. J., in upholding an act "providing for the creation and organization in all cities having three hundred thousand inhabitants and over, of a board of police commissioners" said (loc. cit. 52): "So much of the argument indulged in to demonstrate that the act under consideration is a local and not a general law, is inapplicable to legislation of this character. St. Louis is organized directly under the Constitution. It is not in any one of the four classes of cities which have been defined by the legislature under the Constitution. It would have been entirely appropriate for the Legislature to have designated St. Louis by name instead of referring to it as a city of over three hundred thousand inhabitants."

15. (1894) 123 Mo. 479, 27 S. W. 711. The court also found that there was no distinguishing peculiarity giving rise to a necessity for

hundred thousand inhabitants was held unconstitutional because it was not a general law applying to all cities of the first class, namely, to those first class cities having one hundred thousand inhabitants or over. The court said it created a fifth class of cities in violation of the provision that the legislature should divide the cities in not to exceed four classes. This reasoning was followed in *St. Louis v. Dorr*¹⁶ in which a boulevard act applicable to cities having more than three hundred thousand inhabitants was held unconstitutional. Sherwood, J., dissented from the decision in the latter case on several points one of which was that such act did not violate the constitutional requirement that all cities should be divided into four classes by creating a fifth class; that St. Louis under the constitution constituted a separate class concerning which valid laws might be passed.¹⁷

This view of Sherwood, J., later was adopted by the court in *Kansas City v. Stegmiller*¹⁸ and in *State ex. rel. Hawes v. Mason*.¹⁹ In the latter case a law providing for a Board of Police Commissioners in cities having more than three hundred thousand inhabitants was upheld. It is difficult to justify the decision and doctrine of the *Nurnane* case with subsequent cases and it is not believed that it is the law today. Sherwood, J., distinguished these cases a few years later on the theory that

the law as to the designated class and that the classification was based upon an existing state of facts. Burgess, J., and Sherwood, J., dissented.

16. (1898) 145 Mo. 466, 46 S. W. 976. Accord: *Kansas City ex rel. Dist. v. Scarritt* (1894) 127 Mo. 642, 29 S. W. 845.

17. (1898) 145 Mo. 466, 499, 46 S. W. 976. Sherwood, J., referring to section seven of article nine of Constitution authorizing the division of cities into not to exceed four classes, said (loc. cit. 499): "But it is enough to say of such section that it has nothing whatever to do with the City of St. Louis, since that city is by the Constitution singled out and segregated from all other cities in this State, by express mention by name, as well as by peculiar and express provisions, shared by no other city."

18. (1899) 151 Mo. 189, 52 S. W. 723.

19. (1899) 153 Mo. 23, 52, 54 S. W. 524. Accord: *Bambrick Bros. Const. Co. v. Realty Co.* (1917) 193 S. W. 543 (an act regulating enforcement of liens for street improvements in cities having more than three hundred thousand inhabitants).

legislation concerning St. Louis alone, or cities having "home rule" charters as a class, was valid only when a general law could not have been made applicable.²⁰ It is submitted that the City of St. Louis and the other cities operating under "home rule" charters constitute two separate classes of cities under the constitution in addition to the four classes created by the general assembly acting under the constitution and the class of cities having special charters; and that these two classes of cities are proper classifications for laws defining powers and organization of these cities only so long as there is a reasonable necessity for such classification. It will be noted that the laws concerning the four classes differ from the laws concerning the two classes of "home rule" cities in that laws defining the powers and organization of the cities of any of the four classes are always proper regardless of necessity of such classification under the doctrine of *Copeland v. St. Joseph*.

The power of the legislature operating under "home rule" charters is restricted to matters of general or public concern to the state; and the legislature cannot regulate by a general law the affairs of purely local concern of those cities having "home rule."²¹ Lamm, J., made an excellent statement of the law on this point in *Brunn v. Kansas City*.²²

20. *Henderson v. Koenig*, 168 Mo. 356, 68 S. W. 72, 57 L. R. A. 659. Sherwood, J., in delivering the opinion of the court, said (loc. cit. 376): "But the assertion is made that cases have been decided by this court where local or special legislation, that is to say, legislation applicable alone to the city of St. Louis or alone to Kansas City, has been held valid. This is true, but in the decisions in none of those cases was there any expression or ruling which impinges in the slightest degree on the Constitutional prohibition against a local or special law being enacted where a general law could have been made applicable; on the contrary, either distinct or else implied recognition is constantly given to the idea, that, owing to the circumstances and exigencies of the *particular case*, a general law could not have been made applicable, or where it could not have been made applicable by reason of the fact that the legislation questioned was the result of direct obedience to some specific command of the Constitution. This statement will be found to embrace all the cases decided on the subject."

21. *Kansas City ex rel District v. Scarritt* (1895) 127 Mo. 642, 29 S. W. 845; *Kansas City v. Stegmüller* (1899) 151 Mo. 189, 52 S. W. 723.

22. (1908) 216 Mo. 108, 117, 115 S. W. 446.

"In fine the constitutional idea was that charters under consideration should present a complete scheme of local self-government and that where their provisions conflict with the general statutes on a *merely municipal regulation* (such as condemnation proceedings are held to be) the charter provisions should control; and it has been held that the constitutional plan for amending charters (sec. 16, art. 9.), which directs that they shall be amended by a vote of the people 'and not otherwise' is mandatory and forbids the regulation and direction of purely municipal affairs by act of the legislature. (*Kansas City v. Scarritt*,²³ 127 Mo. *supra*.)"

The question frequently arises with respect to legislation concerning the cities having "home rule" charters as to what are matters of local concern as distinguished from matters of public concern to the state. A number of decisions of the Supreme Court have been handed down upon this question,²⁴ but the scope of this study does not include a discussion of them. An interesting study of the Missouri cases is made by Professor H. L. McBain of Columbia University in the Law and the Practice of Municipal Home Rule.

(4) *Classification of Cities for Special Purposes.*

Wherever the constitution authorizes legislation upon a given subject with reference to certain cities or class of cities then laws passed in pursuance of such provision are upheld altho they may not conform to one of the four classifications. An example of this is the section which provides that: "The General Assembly shall provide, by law, for the registration of all voters in cities and counties having a population of more than one hundred thousand inhabitants, and may provide for such registration in cities having a population exceeding twenty-five thousand

23. (1894) 127 Mo. 642, 29 S. W. 845.

24. *Kansas City ex rel District v. Scarritt* (1894) 127 Mo. 642, 29 S. W. 845; *Kansas City v. Ward* (1896) 134 Mo. 172, 35 S. W. 600; *Kansas City v. Marsh Oil Co.* (1897) 140 Mo. 458, 41 S. W. 943. McBain, Law and Practice of Municipal Home Rule, pp. 172-179.

inhabitants and not exceeding one hundred thousand, but not otherwise." ²⁵

This provision apparently recognizes two distinct classes of cities, *those having more and those having less than one hundred thousand and more than twenty-five thousand inhabitants*, for the purpose of legislation providing for the registration of voters. So in *Ewing v. Hoblitzelle*²⁶ an act was quite properly upheld which regulated the registration of voters in cities having over one hundred thousand inhabitants. The court goes further in *State ex. rel. McCaffrey v. Mason*²⁷ in holding a similar act valid which applied only to cities having more than three hundred thousand inhabitants. Three of the judges based their opinion on the ground that it was a proper classification, while the other three were of the opinion that St. Louis, the only city in the class, was set apart by the constitution into a class by itself and that legislation referring to St. Louis by name would have been proper. It will be noted that the registration of voters is a matter of public concern and is not a matter of local government except in so far as it has to do with city elections. It is submitted that classification other than as to the two classes impliedly provided in the constitution in respect to registration laws should be tested by the same requirements as any other law; and that any classification which is not based upon a difference which bears a reasonable relation to the end sought should be held invalid as local and special.

Another provision in the constitution which classifies cities is contained in section eleven of article ten. It limits the tax rates for city purposes at different amounts for cities of different populations. In *Calland v. Springfield*²⁸ it was contended that cities of the same class must have the same tax rate but the court held that the classification for purposes of taxation did

25. Art. VIII, Sec. 5, Const. of Mo. of 1875.

26. (1884) 85 Mo. 64.

27. (1900) 155 Mo. 486, 55 S. W. 636. Affirmed in *State v. Keating* (1907) 202 Mo. 197, 100 S. W. 648.

28. (1914) 264 Mo. 296, 174 S. W. 396. See p. 20 for a further discussion of this case.

not involve the classification for the purpose of defining powers and organization and that cities of the same class might have different tax rates.

B. STATUTORY CLASSIFICATION WITHOUT DIRECTION BY THE CONSTITUTION.

Under the Constitution of 1875, as interpreted by the court decisions discussed above, there are seven classes of cities in Missouri concerning which general laws may be passed providing for their powers and organization; the four classes of cities operating under general laws, the cities operating under special charters, the general class of cities having "home rule" charters, and St. Louis. Laws which conform to this classification with respect to powers and organization present no difficulty. It is with laws which do not conform to this classification, or which do not concern powers and organization, or which do neither that present the most difficulty.

(1) *Laws Which Do Not Concern the Organization and Powers of Cities.*

Laws which do not concern the organization and powers of cities are not general solely because they apply to all the cities of a specified class.²⁹ There must be peculiar conditions existing in the class designated, with reference to which the law is enacted that justifies such classification.³⁰ Thus a law which

29. *Helper v. Simon* (1891) 53 N. J. L. 550; *Dillon, Mun. Corp. Sec. 151. Semble, State ex rel Harris v. Hermann* (1882) 75 Mo. 340 (law regulating notaries in cities having more than one hundred thousand population held invalid).

In *Helper v. Simon*, Scudder, J., in holding invalid a statute which fixed term and compensation of city physician in cities of the second class, said (loc. cit. 552): "In this case there has been no reason assigned, nor is it apparent, why an officer known as city physician, in a city of the second class, should have a different appointment..... from a physician to be appointed and compensated in a city of the first class or of the third class. Population cannot have any just reference to this distinction between these classes by which the middle class is separated from the others."

30. *State ex rel Atty. Gen. v. Miller* (1890) 100 Mo. 439, 13 S. W.

applies to the City of St. Louis in its function as a county in the scheme of local government³¹ is not general merely because a law applying to St. Louis as a city under a "home rule" charter is regarded as general. The validity of such a law is determined by the general test, i. e., whether a general law could have been made applicable. In *Henderson v. Koenig*³² a law regulating fees of the probate court in cities over three hundred thousand was declared unconstitutional on the ground that there was no exigency "requiring such legislation and confining its operation, as does the act in question, to the City of St. Louis alone."³³

(2) *Laws Which Do Not Comply with the Constitutional Classification of Cities.*

The constitution requires that the powers of each class of cities shall be the same, so that a law defining the powers of

677 (law providing for school directors in cities over three hundred thousand population).

31. Const. of Mo. Art. IX, Sec. 23; *State ex rel Martin v. Wofford* (1893) 121 Mo. 61, 25 S. W. 851 (city was held to mean county).

32. (1902) 168 Mo. 356, 68 S. W. 72, 57 L. R. A. 659.

33. In the following cases laws were held unconstitutional because they were special: *State v. Kring* (1881) 74 Mo. 612 (an act regulating procedure in the criminal courts of St. Louis); *State v. Auslinger* (1903) 171 Mo. 600, 71 S. W. 1041 (an act prohibiting fraudulent voting in cities over three hundred thousand in population); *Wooley v. Mears* (1910) 226 Mo. 41, 125 S. W. 1112 (an act prohibiting the offer for sale of realty without written authority in cities of over three hundred thousand inhabitants); *State ex rel Garesche v. Roach* (1914) 258 Mo. 541, 167 S. W. 1008 (the non-partisan judiciary act applicable to cities over three hundred thousand in population).

In the following cases the laws were held general and constitutional: *State ex rel Monahan v. Walton* (1879) 69 Mo. 556 (an act providing for division of St. Louis into fourteen districts for election of justices of the peace); *State ex rel Manning v. Higgins* (1894) 125 Mo. 364, 28 S. W. 638 (an act regulating the salary of justices of the peace in cities over three hundred thousand inhabitants to divide the city into districts for the purpose of electing constables and justices of the peace); *Spaulding v. Brady* (1895) 128 Mo. 653, 31 S. W. 103 (an act regulating the salary of justices of the peace in cities over three hundred thousand inhabitants); *State ex rel Lionberger v. Tolle* (1880) 71 Mo. 645 (an act regulating the duties of judges of the circuit court in cities having over one hundred thousand inhabitants); *State v. Hayes* (1885) 88 Mo. 344 (a law giving the state in criminal cases additional peremptory challenges in cities having more than one hundred

cities must conform to the constitutional classification, and such laws that do not so conform are unconstitutional.³⁴

But those laws which do not define the structure and powers of cities and towns may adopt any classification that has a proper relation to the object sought. A local option dramshop law was upheld in *State ex rel Maggard v. Pond*³⁵ which applied to all cities having over two thousand five hundred inhabitants altho it divided cities and towns of the fourth class into two parts. Likewise in *Ex Parte Lucas*³⁶ an act regulating the occupation of barbers in cities having more than fifty thousand inhabitants was upheld as a valid exercise of the police power altho the act applied only to a few of the cities of the second class. It was said there was a greater possibility of the spread of disease thru barber shops of large cities than in smaller places.

thousand inhabitants); *State ex rel Martin v. Wofford* (1893) 121 Mo. 61, 25 S. W. 851 (an act regulating appointment of stenographers in criminal courts in cities having more than one hundred thousand inhabitants); *State ex rel Atty. Gen. v. Speed* (1904) 183 Mo. 186, 81 S. W. 1260 (an act regulating salary of coal oil inspectors for cities of the state with a population of three hundred thousand inhabitants); *State v. Tower* (1904) 185 Mo. 79, 84 S. W. 10 (an act making a nuisance the discharge of dense smoke in cities of over one hundred thousand inhabitants); *State ex rel Harvey v. Sheehan* (1916) 269 Mo. 421, 190 S. W. 864 (an act regulating fees and duties of circuit attorneys in cities containing over five hundred thousand inhabitants). Compare *State ex rel Harvey v. Sheehan with Henderson v. Koenig* (1902) 168 Mo. 167, 65 S. W. 620, 57 L. R. A. 846, in which an act regulating the fees of the probate court in cities having over three hundred thousand inhabitants was held invalid.

34. *State ex inf. Mytton v. Borden* (1901) 164 Mo. 221, 65 S. W. 172 (an act held invalid which created a board of public works in cities of over one hundred thousand and less than one hundred fifty thousand inhabitants, St. Joseph being the only city included); *State ex rel Wyatt v. Ashbrook* (1900) 154 Mo. 375, 55 S. W. 627 (an act providing for the licensing of department stores by city officials in cities containing over fifty thousand inhabitants).

35. (1887) 93 Mo. 606, 6 S. W. 469. Affirmed: *Ex Parte Handler* (1903) 176 Mo. 383, 75 S. W. 920; *State v. Handler* (1903) 178 Mo. 38, 76 S. W. 984.

36. (1901) 160 Mo. 218, 61 S. W. 218.

Chapter VII. Local Option Laws.

A law passed in the regular manner by the legislature, and made applicable to all units of any given class of units of local government, but which must be adopted by the voters or officials in a prescribed manner in any of the local units in order that that unit may avail itself of its provisions, is a local option law. The law exists from its passage by the legislature but it does not operate until the contingency happens provided for in the act which usually is adoption by the voters. These laws are confined to matters of local concern. The most common example of these laws is the local option liquor laws, but the use of this legislative device has been resorted to for the solution of many other local problems.

The constitutionality of local option laws is attacked on two grounds; first, it is a delegation of legislative power; second, it is special legislation. The two contentions are so interdependent that in order to discuss the second, it is necessary to dispose of the first.

The first constitutional objection to local option laws was raised in *State ex rel Dome v. Wilcox*¹ against the validity of a local option school law. Chapter forty seven of the General Statutes of 1865 provided a method by which towns and villages could be organized into school districts with given powers upon compliance with certain conditions, the most important of which was the adoption of the proposition by a prescribed vote in the locality concerned. It was contended that this act was not a law of its own force, enacted by the law-making power of the land, but depended for its existence upon a vote of the people of the locality where it was sought to be made operative; that it was a delegation of legislative power and therefore void.²

Wagner, J., gave the opinion of the court that the law in question was enacted by the legislature, that it applied to the entire state, being the law everywhere whether voted upon or

1. (1870) 45 Mo. 458.

2. (1870) 45 Mo. 458, 461.

not, and that it was constitutional, there being no delegation of the legislative power whatsoever. "In the case we are now considering," said Wagner, J., "the act took effect with the other laws contained in the statutes. It was passed according to the prescribed forms designated in the constitution. Its enactment did not depend upon any popular vote, but parties to be affected by it were at liberty to accept the privileges granted, and incur the burdens and obligations it would impose, as their interest or will should dictate. If they elected not to avail themselves of its privileges it did not in the least impair its force; it still stood a valid enactment on the statute book."³

The legislature itself must enact the law.⁴ It cannot without constitutional authority propose a law to be adopted by the electorate,⁵ or by local officials.⁶ Neither can the legislature authorize the officials or voters of a locality to suspend a law.⁷ But, as it is said, "the legislature may pass a law to take effect or go into operation on the happening of a future event or contingency, and that such contingency may be a vote of the people."⁸

The theory adopted in *State ex rel Dome v. Wilcox*, *supra*, that the law exists regardless of its adoption by the voters in any given locality and that it does not constitute a delegation of legislative power, was followed in the subsequent cases on that

3. (1870) 45 Mo. 458, 464.

4. An amendment to the Constitution of Missouri adopted in the general election held November 3, 1908, provides for the initiative and referendum on legislative acts as well as constitutional amendments. This changes the law on this subject. See Section 57, Article IV, Constitution of Missouri.

5. *State ex rel Dome v. Wilcox* (1870) 45 Mo. 458, 464; *Lammert v. Lidwell* (1876) 62 Mo. 188; *Barto v. Himrod* (1853) 4 Seld. (N. Y.) 483.

6. *Ex Parte Smith* (1910) 231 Mo. 111, 118, 132 S. W. 607.

7. *State v. Field* (1853) 17 Mo. 529.

8. *State ex rel Maggard v. Pond* (1887) 93 Mo. 606, 621, 6 S. W. 469; *St. Louis v. Alexander* (1856) 23 Mo. 483, 513.

point and it remains the law today in this state.⁹ This doctrine has also been adopted in nearly all other jurisdictions.¹⁰

The second objection urged against local option laws was that such laws were special and local in that they operated only in those localities adopting the act. This contention was made in *State ex rel Dome v. Wilcox*, discussed in connection with the first objection. Wagner, J., after holding that the local option school law was enacted by the legislature and not by the voters and that the law existed in all parts of the state whether adopted by vote or not in any given locality, disposed of this second contention as follows: "Special statutes relate to certain individual classes or particular localities. Had the act applied to a certain specified town or a single corporation, it would have been special; but such is not the case. It is co-extensive with the state, and its influence is felt in every county and almost every township. It is conceded that it does not include in its operation every individual nor extend to all territory, but that is not required."¹¹

The theory of this decision is that the law derives its existence from the enactment by the legislature and not from adoption in any given locality, hence its existence is general thruout the state and is not confined to localities adopting the same. The school law does not of itself organize a school district and give it powers, but it provides a method by which the people of the locality may organize and upon this district, duly organized in

9. Opinion of Supreme Court Judges on Township Organization Law (1874) 55 Mo. 295; *State ex rel Maggard v. Pond* (1887) 93 Mo. 606, 5 S. W. 469 (local option dramshop law); *Ex Parte Handler* (1903) 176 Mo. 383, 75 S. W. 920 (dramshop law); *State v. Handler* (1903) 178 Mo. 38, 76 S. W. 984 (dramshop law); *Hall v. Sedalia* (1910) 232 Mo. 344, 134 S. W. 650 (local option sewer and drainage law for cities of third class); *State ex inf. Wright v. Morgan* (1916) 268 Mo. 265, 187 S. W. 54 (local option school district consolidation act).

10. Opinion of the Justices (1894) 160 Mass. 586, 36 N. E. 488; *In re O'Brien* (1904) 29 Mont. 530, 75 Pac. 196, 1 Ann. Cases 373 and note p. 378. Also see note, J. P. Hall, Cases on Constitutional Law, p. 121. Contra: *Rice v. Foster* (1847) 4 Harr. (Del.) 479.

11. (1870) 45 Mo. 458, 465.

accordance with the provision of the statute, the law operates by investing it with certain powers.

This theory was affirmed a few years later in the *Opinion of Supreme Court Judges on Township Organization Law*.¹² In reference to the Township Organization Law the court said: "It is a general law made for the whole State, and by the terms of the act itself took effect from and after its passage. Every county in the State may avail itself of the privileges offered by this law by a majority vote of its people. It is left to the option of the counties whether they will organize under it or not. If a majority vote for it, such vote does not create the law, but places the county so voting within its provisions and the organization then takes effect, and also the law, as it existed before the vote was taken."

The question was again brought up in *State ex rel Maggard v. Pond*¹³ in which a local option dramshop law was held constitutional and the doctrine of the earlier cases affirmed. There was a strong dissenting opinion by Sherwood, J., in which he contended that the constitutionality of the act was to be determined by its *operation* and not by its form.¹⁴

The act was local in operation, hence void as a local law. It was also objectionable as a special law since it singled out those members of the class of dramshop keepers in the state which resided in places adopting the vote and prohibited them from selling liquor. It was also ineffective because it resulted in the enactment of a special and local law by the partial repeal in those counties and cities adopting the act of a general

12. (1874) 55 Mo. 297.

13. (1887) 93 Mo. 606, 6 S. W. 469.

14. (1887) 93 Mo. 606, 641. Sherwood, J., dissenting: "If the legislature by an act had designated those counties and towns by name which have as it is said, adopted by their votes 'local option,' it could not be doubted that such an act would be both special and local. The fact that the people, by their votes, instead of the legislature, by an act, have designated those counties, can not alter the principle or vary the result; for what the legislature cannot do directly it cannot do indirectly. In such cases, the 'constitutionality of an act is to be determined by its operation, and not by the form it may be made to assume,' *State ex rel. v. The Judges*, 21 Oh. St. 11."

law providing for the sale of liquor. Also it was void, he argued, as a suspension of the general law authorizing the sale of liquor. The answer of the court to these propositions was that the law was of general application, that this was sufficient, and that "the fact that one or more counties, or one or more cities or towns, may, by a majority vote, put the law in operation in said county or counties, cities or towns, and that other counties or cities and towns may not do so, does not affect the rule nor furnish a test by which to decide whether the law is local or general, and this court has never held otherwise."¹⁵

Sherwood, J., further contended: "If such legislation as this is valid then I confess I can see no obstacle in the way of having *murder, rape, burglary*, etc., punished in as many various ways as the voters in an equal number of localities may, by virtue of their newly-found law making function, determine."¹⁶ And again "Under its operation, the laws respecting commercial paper, limitations of actions, the punishment of crimes, etc., may vary with different localities, and still be held general laws, and constitutional."¹⁷ The answer to this argument is that local option laws are only valid as to local matters.¹⁸ As to what is a

15. (1887) 93 Mo. 606, 621, 6 S. W. 469.

16. (1887) 93 Mo. 606, 647, 6 S. W. 469.

17. (1887) 93 Mo. 606, 687, 6 S. W. 469.

18. "It may be conceded as the established doctrine, that statutes creating municipal corporations or imposing liabilities upon municipalities, or authorizing municipalities to incur debts and obligations, or to make improvements, may be referred to the popular vote of the districts immediately affected—that is to say, the people of such districts may decide whether they will accept the incorporation or will assume the burdens. This is the prevailing rule in reference to local matters." Wagner, J., in *Lammert v. Lidwell* (1876) 62 Mo. 188, 191. "Thus it will be observed that both the majority and minority opinions proceed from the same premises, to-wit, that it is a delegation of legislative power for the legislature to submit to the people at large for their adoption or rejection a law which affects the whole people, but that it is not a delegation of legislative power for the Legislature to enact a complete law, conferring a power or privilege upon a locality as to a mere matter of local concern, and leave it to the will of the constituted authorities of the locality or to the people thereof, to exercise the power or privilege as they see fit."—Marshall, J., in dissenting opinion, commenting upon *State ex rel Maggard v. Pond*, 93 Mo. 606, 6 S. W. 469, in *Owen v. Baer* (1899) 154 Mo. 434, 528, 55 S. W. 644.

local matter depends upon custom and the nature and peculiar interests of local government.¹⁹ Sherwood, J., insisted that local option liquor laws including the enforcement acts were a part of the general criminal law of the state and were not a matter for local discretion. But the court held in accordance with the weight of authority elsewhere²⁰ that such laws were proper as a matter of local police regulation, and this view has remained the law in this state.²¹

In conclusion it may be said that a local option law is created by act of the legislature; that it exists thruout the state regardless of adoption by the voters in any given unit of local government to which the act applies; that it must concern a subject which may properly be dealt with differently by different parts of the state, such as matters of local government and matters of local improvement, local welfare and local police regulations; and that it does not become a special or local law within the constitutional prohibition when set in operation by adoption in any locality. When adopted such laws carry with them criminal enforcement laws, and these enforcement laws are not objectionable as a denial of equal protection of the law because they make an act a crime in one locality which would not be so in another locality where the law has not been adopted. The criminal feature is incidental and necessary for enforcement of local option laws wherever they are set in operation.²²

Columbia, Missouri.

ROSCOE E. HARPER

19. *Opinion of the Justices* (1894) 160 Mass. 586, 36 N. E. 488; *State v. Copeland* (1896) 66 Minn. 315, 69 N. W. 27, 61 Am. St. Rep. 410.

20. *Fouts v. Hood River*, (1905) 46 Or. 492, 81 Pac. 370, 1 L. R. A. N. S. 483; *In re O'Brien* (1904) 29 Mont. 530, 75 Pac. 196, 1 Am. & Eng. Ann. Cas. 373, and note on p. 378 in which the authorities are listed. Also see J. P. Hall, *Cases on Constitutional Law*, pp. 116, 121.

21. *Owen v. Baer* (1899) 154 Mo. 434, 55 S. W. 644; *Ex Parte Handler* (1903) 176 Mo. 383, 75 S. W. 920; *State v. Handler* (1903) 178 Mo. 38, 76 S. W. 984; *Hall v. Sedalia* (1910) 232 Mo. 344, 134 S. W. 650; *Barnes v. Kirksville* (1915) 266 Mo. 270, 280, 180 S. W. 545.

22. *Ex Parte Swann* (1888) 96 Mo. 44, 51, 9 S. W. 10; *State v. Rawlings* (1910) 232 Mo. 544, 134 S. W. 530.

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NOTES ON RECENT MISSOURI CASES

INSURANCE AGENCY—RIGHT OF AN AGENT TO RENEWAL COMMISSIONS. *Locher v. New York Life Ins. Co.*¹ Plaintiff was employed by defendant to solicit life insurance under a contract, which in the beginning covered a period of one year, but which was thereafter renewed from year to year. Defendant agreed to pay plaintiff as compensation for his services, among other things, commissions on all renewal premiums, paid on account of policies originally procured by plaintiff for a stated number of years after the writing of the policies. Plaintiff breached the agreement, and was accordingly discharged. After his dismissal, certain renewal premiums were paid on policies that he had originally secured for defendant, and he claimed a right to commissions on these premiums in spite of the fact that his agreement had been terminated as a result of his wrongful conduct and breach of the same. The St. Louis Court of Appeals denied plaintiff's right to recover, basing its decision on the *fact* that the contract *expressly limited* the obligation to pay the commissions to such time as the contract should

1. (1919) 200 Mo. App. 659, 208 S. W. 862.

be in force and operation. The court also intimated by way of *dictum* that renewal commissions, falling due after the ending of the employment ought not as rule to be recovered, even tho the contract is silent on this point. It was suggested that the parties could not be supposed to have intended that commissions should continue to come to the agent after he has ceased to act in such capacity.²

There can be no question as to the soundness of the actual decision in the case. If the agreement was that the commissions should cease with the agency, there was no possible basis for plaintiff's recovery.³ But the *dictum* in the case apparently generalizes, and lays down a broad rule, and for this reason would seem to be worthy of some consideration.

An agent might sue for commissions accruing after the ending of his agency either under a contract employing him at will, or under one that employed him for a specified length of time. If the contract is of the last mentioned type, it is possible that it might have come to an end in one of the following ways: by its own terms (i. e. by the lapse of the time specified), by the rightful discharge of the agent, or by the wrongful discharge of the agent. In the case of the rightful discharge of the agent, the discharge might have been due to no deliberate breach of the contract on his part, but to an unforeseen incapacity arising, which prevented his doing the work required of him under the agreement. It is proposed to discuss the cases falling within the various assumptions, *where the contract is silent as to the effect of the ending of the agency*

2. The extent of the *dictum* is rather obscure; the court, however, does intimate that if the contract of agency is one at will that under those conditions the agent might perhaps have a right to collect commissions that fall due after the termination of the employment. 208 S. W. 862, 1. c. 867. Aside from this possible exception the court seems to feel that an agent ought not to recover commissions accruing after the ending of the agency. "The courts in construing agreements like the one we have before us, proceed on the notion that the compensation to be received by the agent from year to year thru commissions on renewal premiums, is associated with the continuance of his agency and is partly earned by services subsequent to the procurement of the risk,

not solely by its procurement; the purpose being to bind him to steady work in behalf of the company." 208 S. W. 1. c. 865. "The authorities are overwhelming that such provisions, *standing alone*, deprive the agent of any right to commissions on renewal premiums paid after the termination of the agency." *id.*

3. It would seem that the court might well have decided the case also on the ground that the defendant had deliberately breached his contract of employment by entering the employ of a rival during the period covered by his contract with defendant; 208 S. W. 1. c. 865. This would have been an easy way to have disposed of the case. See note 9 *infra*.

on the right to renewal commissions, and to determine the state of the law governing in each instance.*

It has been held that where the contract of employment is one at will, the agent has a right to renewal commissions that fall due after the termination of the agency.⁴ It was said that the commission is earned as soon as the policy is written, time of payment alone being postponed until the renewal premium is paid, and made contingent on this last event; that the commission is analogous to salary earned by securing the policy. Under this line of decisions, continuation of the agent in the employ of the company has nothing to do with the right to the commission; that depends alone on the payment of the renewal premium.

If the contract can be ended at the will of the employer, a construction of this kind seems to be reasonable. It is hardly proper to assume that the agent would stipulate for the payment of commissions at a future date, which might well fall beyond the period of the agency, if the obligation to pay the same was to depend on the existence of the agency at the time of payment. Such a stipulation would amount to no obligation at all being assumed by the principal, because he would be free to escape it by discharging the agent without incurring any liability of any kind. For this reason it is believed that the agent has a right to the commissions under this state of facts. It is urged that the parties must have intended that the commissions should be paid regardless of the continued existence of the agency, for if they did not intend this, then the agent was bargaining not for a contractual right, but for a right depending merely on the good will of his employer.⁵

4. This note is not concerned with cases where there is an express provision that the commissions shall either cease with the ending of the agency, or continue after that event; as has already been suggested the express provision of the contract, if there is one, will control. The problem presented for analysis is the soundness of the following quotation taken from the case under discussion: "The right of an agent to commissions on renewals collected, or falling in after the end of his agency, can rest only on *express* terms in his contract, or be necessarily drawn from an interpretation of that contract as a whole." 208 S. W. 1. c. 866.

5. *Hercules etc. Soc. v. Brinker* (1879) 77 N. Y. 435 (the decision of

the New York Court of Appeals, in this case is a reversal of the decision of the court below without opinion; the lower court had denied the agent's rights to renewal commissions after the termination of the employment. For this reason the case is unsatisfactory); *Heyn v. N. Y. etc. Co.* (1908) 192 N. Y. 1, 84 N. E. 725. *Mich. etc. Co. v. Coleman* (1907) 118 Tenn. 215, 100 S. W. 122, 1. c. 127. In the case last cited it was said: "The agent's commissions on first premiums and his percentage on renewal premiums are both regarded in the light of compensation to him for his services in obtaining policies for the company and thereby building up its business."

6. "This (i. e. a construction other

The rule permitting the agent to recover as above stated is not universal, and there are some decisions, and some *dicta* to the effect that the agent cannot get commissions that accrue after the end of the agency.⁷ This holding is usually based on the ground that it was not the intention of the parties that the principle should continue liable to pay the commissions after the agent has left his employ. The courts that hold this way seem to feel that it is hardly conceivable that a principal would be willing to continue paying commissions under such conditions.⁸

Where the contract is for a stated period, and that period has expired, the situation ought to be dealt with in the same way as the situation in a case where the employment is at will and has been ended. The agent should have a right to commissions on renewal premiums paid after the termination of the agency. That must have been the intention of the parties, and what the agent bargained for. If he did not do this, then he was not bargaining for money, but for money if his employer wanted to retain him in his employ, and he wanted to remain in it.

than that urged by the writer) would be a harsh, and unjust construction of the contract, and would place the plaintiff at the mercy of the defendant." *Heyn v. Ins. Co.* note 5 *supra*.

7. *Fidelity etc. Co. v. Washington etc. Co.* (dictum) (1912) 193 Fed. 512; *Scott v. Travelers' etc. Co.* (dictum) (1906) 103 Md. 69, 63 Atl. 377; *Andrews v. Travelers' etc. Co.* (1902) 24 Ky. L. R. 844, 70 S. W. 43; *King v. Raleigh* (dictum) (1903) 100 Mo. App. 1, 70 S. W. 251. It is doubtful whether the statement in this case ought to be characterized as standing for the proposition that an agent cannot where the contract is silent in this respect recover commissions that accrue after the end of the agency. The contract in this case expressly provided against any such right, and it appears to the writer that what the court said about an agent's having no rights to the commissions is to be confined to the cases where there is such a provision against the same. *Ballard v. Travelers' etc. Co.* (1896) 119 N. C. 187, 25 S. E. 956; *North Carolina etc. Co. v. Williams* (1884) 91 N. C. 69, 49 Am. Rep. 636.

8. Sometimes there are other reasons given for the denial of the right. It has

been said that the commissions are compensation associated with the continuance of the agency, and are partly earned by services subsequent to the procurement of the risk. See to this effect *King v. Raleigh* and *North Carolina etc. Co. v. Williams*, *supra*, note 7. See also note 2.

It has also been said that the agent cannot recover the commissions for the reason that his power is not coupled with an interest. This was said in the case under review and also in *Ballard v. Travelers' etc. Co.* and in *North Carolina etc. Co. v. Williams*, *supra*, note 7. It would seem to be entirely obvious that there is no power coupled with an interest in a case of this kind, but that does not settle the matter one way or another. If the commissions are the equivalent of salary earned when the policies are written then they are due regardless of whether or no the agency is revocable or not. See *Mich. etc. Co. v. Coleman*, *supra*, note 5. There the court admitted that there was no power coupled with an interest, but nevertheless held that the commissions were recoverable on the theory last mentioned.

So far as is known there are no cases that deal with this exact situation, but the opinion is hazarded that an agent would be permitted to recover the commissions if the court to which the question was presented approved of the decisions that allow commissions to an agent in a case of an employment at will. But if the court did not approve of those holdings, the agent's recovery would be denied.

Where the employer ends the agency by discharging the agent for cause, there is no right to commissions that accrue thereafter, if the breach of the agreement by the agent has been due to his deliberate default.⁹ It does not make any difference that the agent would have had a right to such commissions if he had not been discharged, because the right to the same depends on the contract's being alive; the agent has by his breach made it possible for the principal to rescind the same rightfully, and for this reason the agent is not in a position to assert his right. After all, the agent is obligated to perform his side of the agreement for the principal, and this performance is the compensation that the latter is to get for the payment of the later accruing commissions, and if this compensation is not received, it is but just that the agent should be denied all further rights under the contract. No man, who is substantially in default ought to be permitted to sue on his contract.¹⁰

It has been suggested that it might happen that the agent's services might be dispensed with by the principal for a cause not due to an intentional default on the part of the former. Suppose that the agent becomes sick, ought he under these conditions to lose his right to renewal commissions falling due after this event? Or to take an analogous case, suppose that the agent dies, ought his estate to lose the commissions? These questions are practically of first impression so far as the rights of insurance agents are concerned, but there are rules that are fairly well developed in the field of master and servant, which ought to furnish a

9. *Burleson v. Northwestern etc. Co.* (1890) 86 Cal. 342, 24 Pac. 1064; *Phoenix etc. Co. v. Holloway* (1883) 51 Conn. 310; *Frankel v. Mich. etc. Co.* (1901) 158 Ind. 304, 62 N. E. 703; *Armstrong v. National etc. Co.* (1908) 112 S. W. (Tex.) 327; *Walker v. John Hancock etc. Co.* (1910) 80 N. J. Law 342, 79 Atl. 354.

10. *Hale v. Brooklyn etc. Co.* (1890) 120 N. Y. 294, 24 N. E. 317, might be interpreted as a decision *contra* to the generally prevailing rule, given above. In that case the agent severed his con-

nection with the company during the term of the contract with the consent of the latter, and the court held that unless the company proved that the agent's resignation involved his releasing the company from its obligation to pay after accruing renewal commissions that the agent could recover them. It might be suggested that the acceptance of the agent's resignation amounted to a rescission of the agreement, and as a result the agent's contractual rights of all kinds were wiped out. The court rejected this notion.

working analogy, if the commissions are to be regarded as the equivalent of salary earned when the policy is written, in which light it is deemed they should be regarded.

If a servant agrees to work for his master for a definite time, and the salary, or wages for the work to be done, is to be paid in a lump sum at the end of the term, and the servant is incapacitated thru unforeseeable illness to complete the work, it is held that there can be no recovery from the master upon the contract for the work that he has done. The reason for this is that the agreement is entire and not severable. If this is the case no wages are due the servant until the whole of the work bargained for has been furnished to the master, and consequently all relief under the contract must be denied the servant. The master's obligation to pay is conditional on the servant's performing all the work, and of course the rule would be the same where the failure to perform by the servant was due to his death instead of to his illness.¹¹ A decision of this kind, while it seems hard on the servant, is right and is consistent with contract law. A court has no right to divide an entire promise, and to say that it shall be proportionally performed for part performance by the promisee.

It does not follow from this, however, that the servant under the assumed facts would have no relief at all, and it might well be that he would have a right to sue in quasi-contract for the value of the services that he has actually rendered, or if he is dead that his estate would have such a right. There has been some benefit conferred on the master, and if the value of that exceeds the damage that has resulted from the servant's inability to finish his work, it would be just to allow a recovery to this extent. There are cases that would permit a recovery along these lines, and they are just and proper.¹² The only possible objection to permitting a recovery would be that the servant is in default, but this is due to his misfortune, and therefore ought not to preclude the giving of relief in an action where equitable principles are applicable, and in the face of the further fact that there has been actual benefit conferred on the master. It seems needless to say that the rule as above

11. *Cutter v. Powell* (1795) 6 T. R. 320. See also *Helm v. Wilson* (1835) 4 Mo. 41, 1. c. 46. "We hold the law to be, that where there is a special agreement the party who is to execute it must do so before he can recover anything." But see *contra Green v. Linton* (1838) 7 Porter (Ala.) 133, 31 Am. Dec. 707, where the court in a case of this kind held that the promise to pay wages at the end of the term could be

apportioned, and the servant, who had become ill could recover on the contract for the work that he had actually performed prior to his illness.

12. *Fuller v. Brown* (1845) 11 Met. (Mass.) 440; *Wolfe v. Howes* (1859) 20 N. Y. 197. See also *Jennings v. Lyons* (1876) 39 Wis. 553. The older English decisions seem to deny a right even in quasi-contract, *Cutter v. Powell*, *supra*, note 11.

stated ought not to give the servant a right except in a case where his default is due to no fault of his own. If the servant has deliberately abandoned the contract he ought never to be permitted to recover in quasi-contract or any other kind of an action.¹³

Applying these rules to the agent's or his estate's right to recover renewal commissions, the commissions ought not to be recoverable on the contract itself. The consideration for the payment of the commissions is the performance by the agent of his side of the agreement up to the very moment that they are payable.¹⁴ It ought to be, however, that if the agent has stopped performance of his contract because of accidental incapacity, that the principal should be liable for any unpaid benefit received from the original writing of the policy in an action of quasi-contract, less such sum as he may have been damaged by the agent's failure to render full performance of his side of the agreement. Perhaps there might be one difficulty in the way of the agent's recovery, and that would be that the value of such benefit could not be measured in dollars and cents, but aside from this, and if the amount can be ascertained, the right to relief seems clear.

Turning to the cases where the employer ends the agency wrongfully by an improper discharge of the agent, the commissions can be recovered. In a situation of this kind the courts have almost always held that the agent earns the right to renewal commissions when he first writes the

13. *Olmstead v. Beale* (1837) 19 Pick. (Mass.) 528; *Earp v. Tyler* (1881) 73 Mo. 617. *Contra: Britton v. Turner* (1834) 6 N. H. 481, 26 Am. Dec. 713. This case permitted the employee to recover on a *quantum meruit* in spite of a deliberate breach of the contract, and would seem to be a decision, which in an effort to "do equity" has encouraged a man to leave his employ when so inclined resting assured that he will be able to recover for the work that he has done less possible damage that he may have caused his employer.

There is a class of cases mid-way between the case of a deliberate breach by the employer and an accidental breach represented by cases where the employee has acted in good faith, and has endeavored to live up to the agreement, but has thru lack of ability failed to give satisfaction to his employer, who has

discharged him, and been justified in so doing. Ought such a servant be entitled to recover the value of his services? There are some cases that have permitted him to do this, if he has acted in good faith. See Woodward, *Law of Quasi Contract*, sec. 174. See *Lindner v. Cape etc. Co.* (1908) 131 Mo. App. 680, 111 S. W. 600, *contra*, containing valuable discussion of Missouri decisions.

14. *Mills v. Union etc. Co.* (1899) 77 Miss. 327, 28 So. 954. In this case the executor of the deceased agent brought an action in equity to recover renewal commissions accruing after the death of the agent, his action being on the contract, and being brought after the renewal premiums were paid. The court was right, it is submitted, in denying relief. The action should not have been on the contract, but should have been brought for unjust enrichment.

policy. If this is the case, it follows naturally enough that the right cannot be destroyed by the principal's illegal attempt to wipe out the contract.¹⁵

J. L. PARKS.¹⁶

BILLS AND NOTES—PARTY SECONDARILY LIABLE—DISCHARGE. *Highleyman v. McDowell Motor Car Co.*¹ Plaintiff sued defendant, the McDowell Motor Car Company, on two promissory notes executed by O. L. Boss to the defendant and indorsed by the defendant to the plaintiff. Prior to this action plaintiff had brought suit on the same notes against Boss, the maker, but failed to recover, judgment being rendered for Boss in consequence of the finding of the jury that certain equities existed between Boss and the payee, the Motor Car Company, which discharged Boss, of which equities the plaintiff had knowledge when he purchased the notes. In the present suit against the Motor Car Company on its contract of indorsement the Kansas City Court of Appeals held the indorser liable, the judgment in favor of the maker in the previous suit not operating to discharge the Motor Car Company.

At common law the indorser or drawer is, as a general rule, discharged if, by act of the holder, the maker or acceptor is discharged, or any right of the indorser or drawer against other parties to the instrument is impaired.² But this rule does not extend to cases where the

15. *Newcomb v. Imperial etc. Co.* (1892) 51 Fed. 725; *Wells v. National etc. Co.* (1900) 99 Fed. 222; *Aetna etc. Co. v. Nexsen* (1882) 84 Ind. 347, 43 Am. Rep. 91; *Lewis v. Atlas etc. Co.* (1876) 61 Mo. 534; *Sterling v. Metropolitan etc. Co.* (1888) 2 N. Y. Supp. 84, aff'd without opinion (1891) 130 N. Y. 632, 29 N. E. 150; *Richey v. Union etc. Co.* (1909) 140 Mo. 486, 122 N. W. 1030. In *Hepburn v. Montgomery* (1834) 97 N. Y. 617, it was held that the obligation of the insurance company to continue to pay renewal commissions was subject to the implied condition that it would continue in business for the term covered by the contract; and that the insolvency of the company resulting in its dissolution would excuse its receiver from further liability as to renewal commissions. The case is distinguishable from

the cases cited above because of the implied condition. But is the implication warranted? Usually the insolvency of the employer does not excuse him from liability to his employees for a premature ending of the contract of employment. Should the fact that the employer in this case was a corporation change the rule?

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1. (1920) 216 S. W. (Mo. App.) 52.

2. *Ex parte Wilson* (1805) 11 Ves. Jun. 410, 32 English Reprint 1145; *English v. Darley* (1800) 2 Bos. & Pul. 61, 126 English Reprint 1156; *Gould et al v. Robson* (1807) 8 East 576, 103 English Reprint 463; *Smith v. Rice* (1858) 27 Mo. 505; *Couch v. Waring* (1832) 9 Conn. 261.

maker or acceptor is discharged by operation of law.³ Thus, if the holder agrees with the maker to stay execution on a judgment against him for a specified period, such agreement will operate to discharge the indorser;⁴ if the holder who has satisfied a judgment against the maker for the amount of the note later sues the indorser for a balance of interest due on the note and not included in the judgment, he cannot recover since he has voluntarily taken a judgment for a smaller sum, thereby discharging the maker and destroying the remedy of the indorser against the maker.⁵ On the other hand it has been held that if the maker is discharged by the Statute of Limitations, the indorser is not discharged.⁶ Nor does the discharge of the maker by virtue of a bankruptcy or insolvency act discharge parties secondarily liable.⁷ In view of the foregoing, the decision in the case under review would seem beyond question as a common law proposition. The discharge of Boss by virtue of the judgment in the preceding suit would be ineffectual to discharge the Motor Car Company on its contract of indorsement.

Section 120, Clause 3, of the Negotiable Instruments Law, as recommended to the Legislatures of the various states and as adopted, without modification, by all but Illinois and Missouri,⁸ provides that "a person secondarily liable on the instrument is discharged . . . (3) by the discharge of a prior party." This clause was one of the several subjects of the Ames-Brewster controversy with respect to the Negotiable Instruments Law, Dean Ames taking the view that Clause 3 included any discharge, whether by act of the holder or by operation of law, and Judge Brewster maintaining that by virtue of the rule of statutory construction that in statutory revisions restating the common law no change is presumed except by the clearest and most imperative implication, this clause applied only to discharges by the holder and excluded discharges by operation of law.⁹ The few cases in which this

3. *Ex parte Jacobs* (1875) 10 L. R. Chan. App. Cases 211; *Phillips v. Solomon* (1871) 42 Ga. 192; *Guild v. Butler* (1877) 122 Mass. 498; *Post v. Losey* (1887) 111 Ind. 74. See also *MacDonald v. Bovington* (1792) 4 T. R. 825, 100 English Reprint 1323; *Nadin v. Battie* (1804) 5 East 147, 102 English Reprint 1025; Chitty on Bills, 10th Ed. p. 289; Story, Bills of Exchange, 2nd Ed., p. 558; Story on Promissory Notes, 7th Ed., p. 589.

4. *Smith v. Rice* (1858) 27 Mo. 505.

5. *Couch v. Waring* (1832) 9 Conn. 261.

6. *Nelson v. First National Bank* (1895) 69 Fed. 798.

7. See cases in Note 2, *supra*.

8. The Illinois act omits Clause 3. See Hurd's Revised Statutes, 1917, Ch. 98, Sec. 137. The Missouri act adds to Clause 3, "except when such discharge is had in bankruptcy proceedings." See Revised Statutes, Missouri, 1909, Sec. 10090.

9. For the complete text of the Ames-Brewster controversy on this point, see Brannan, The Negotiable Instruments Law, Third Edition, pp. 430-1; 444-5; 453; 528-30.

point has arisen under the N. I. L. seem to support the contention of Judge Brewster. In *Silverman v. Rubenstein*¹⁰ it was held that a composition in bankruptcy against the maker of a promissory note would not operate to discharge the indorsers, the discharge being effected by operation of law and not by consent of the parties. The court did not, however, cite the N. I. L. In *Everding & Farrel v. Toft*,¹¹ the court stated, in a *dictum*, that Section 120, Clause 3, "only applies to a discharge by the act of the creditor, and does not include discharges by operation of law, for example bankruptcy, nor does it embrace a situation where after trial on the merits the note is in effect destroyed because of a vice which is inherent in the transaction." Had the Missouri case now under review been decided under Section 120, Clause 3, of the N. I. L., as generally adopted, it is a fair guess that practically every jurisdiction would have upheld the contention of Judge Brewster.

As already noted, the Missouri statute adds to Clause 3 the words "except when such discharge is had in bankruptcy proceedings," thereby making the section read: "A person secondarily liable on the instrument is discharged . . . (3) by the discharge of a prior party, *except when such discharge is had in bankruptcy proceedings.*" While the result reached by the court in the case under review is desirable, can the decision be supported on principle in view of the peculiar wording of the Missouri statute? It would seem doubtful. The court, in reaching its decision, contents itself with stating that "Clause 3 of said statute is merely declaratory of the common law theretofore existing, and the discharge therein mentioned does not mean a discharge by operation of law, but a discharge by some act or neglect of the creditor." It entirely overlooks the fact that the Missouri statute, after laying down in general words that a person secondarily liable on an instrument is discharged by the discharge of a prior party, adds a single and express exception—"except when such discharge is had in bankruptcy proceedings." By a well known principle of statutory construction, *expressio unius est exclusio alterius*, this exception affirms the application of the general words to all other cases not excepted and excludes all other exceptions.¹² Or, to put it as stated by Sutherland in his work on Statutory Construction: "The exception of a particular thing from the operation of the general words of a statute shows that in the opinion of the lawmaker the thing excepted would be within the general words had not the exception been

10. (1917) 162 N. Y. Supp. 733.

11. (1916) 82 Ore. 1, 160 Pac. 1160.

12. *Bend v. Hoyt* (1839) 13 Pet. 263, at 271-2; *Arnold v. U. S.* (1892) 147 U. S. 494, at 499; *Equitable Life Assurance Soc. v. Clements* (1890) 140 U.

S. 266; *Olive Cemetery Co. v. City of Philadelphia* (1880) 93 Pa. St. 129; *Brocket v. Ohio R. R. Co.* (1850) 14 Pa. St. 241, 243; *Sherrin v. Bugbee* (1844) 16 Vt. 439, at 445.

made."¹³ Applying this principle to the case under review, the discharge of Boss, tho by operation of law, would discharge the indorser, since the discharge was not "had in bankruptcy proceedings." To avoid such an unfortunate result the court treated Clause 3 as if the exception with respect to bankruptcy proceedings had been omitted.

The difficulty lies, of course, in the wording of the Missouri act. The addition of the exception with respect to bankruptcy to Clause 3 is not only unnecessary in view of the common law and particularly in view of Section 16 of the National Bankruptcy Act,¹⁴ which covers the precise situation, but it renders it impossible for a court to reach a desirable result in an action against an indorser in just such a case as *Highleyman v. McDowell Motor Car Company* where the indorser had been discharged by operation of law otherwise than as a result of bankruptcy proceedings, without ignoring a well established principle of statutory construction, as was done in this case.

STANLEY H. UDY.¹⁵

CONFLICT OF LAWS—SPECIFIC PERFORMANCE OF CONTRACT CONTAINING STIPULATION THAT SAME SHALL BE GOVERNED BY THE LAWS OF ANOTHER STATE—PLEADING THE FOREIGN LAW. *Fidelity Loan Securities Company v. Moore.*¹ This was an action for the specific performance of a contract to purchase real estate, made by defendant. The land was situated in Texas, and the agreement contained a stipulation that in the event of a dispute, or of litigation to enforce the contract, that the laws of Texas, as interpreted by the courts of that State, should control the rights and obligations of the parties. The contract also, by its terms, was to be performed in Texas. The entire contract, including the stipulation, was set forth in the petition, but the plaintiff did not plead the laws of Texas, nor did it allege anything concerning such laws or their effect on the right to bring this action. Defendant demurred to the petition and the trial court sustained the demurrer. On plaintiff's appealing, the Supreme Court affirmed the judgment, *nisi*, holding that plaintiff's failure to plead the laws of Texas rendered the petition fatally defective.

In making the decision, the Supreme Court placed some stress on the fact that the laws of Texas were made a part of the contract by

13. 2 Lewis' Sutherland, Statutory Construction, 2nd Edition, p. 672.

14. See 30 Stats. at L. 544. Section 16 of this Act reads as follows: "The liability of a person who is co-debtor with, or guarantor, or in any manner a

surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

15. Assistant Professor of Law, School of Law, University of Missouri.—Ed.

1. (1919) 217 S. W. 286.

direct reference, but the real reason for the decision was that the laws of Texas "constitute a part of the very cause of action, and should be pleaded as well as proven in the trial of the case."²

It is generally held, as in the instant case, that parties may stipulate that the laws of a foreign state shall control their rights and obligations under a contract. Such a stipulation will control under proper conditions, and the law will be applied if it is not contrary to the policy of the forum. In such a case the law of the forum "is material only as setting a limit of policy beyond which obligations will not be enforced there."³ Accordingly, the law agreed on is the very basis of the cause of action and without it plaintiff must fail altogether.⁴ It follows naturally enough from this, that the court has got to have the law agreed upon before it gives relief. It would seem, therefore, that the only question, so far as the case under review is concerned is, was the law of Texas before the court so as to enable it to give plaintiff specific performance? Certainly it was not there as a result of plaintiff's own efforts. If it was before the court it must have been there by virtue of some rule, which would permit the court to dispense with what might otherwise well have been deemed an essential allegation of the petition, and to indulge in some kind of a presumption, which in a loose sense of the word, might be said to be in aid of a defective pleading. Before considering this problem, and answering the question, it is proposed to consider the general matter of presumptions as to foreign law, and to then determine the propriety of substituting a presumption, if there be one as to that law, for a pleading of the same.

A line of decisions has established the rule that the common law is presumed to obtain in those states carved out of what was once English territory, or in those states wherein the common law was put in force by act of Congress. The courts of this State will in a case properly determinable according to the law of such a foreign state, there being no proof as to the nature of the same, presume that it is the same as the common law, as interpreted by the courts of Missouri.⁵ This is the rule

2. (1919) 217 S. W. 286, p. 289.

3. See statement by Graves, J., in the principal case and authorities there cited. 217 S. W. 1. c. 288. The quotation is from the opinion of Mr. Justice Holmes, in the case of *Cuba R. Co. v. Crosby* 222 U. S. 1. c. 478, where the learned judge was discussing an analogous case.

4. Graves, J., in the principal case 217 S. W. 1. c. 289. Wharton on Conflict of Laws, Third Edition by Parm-

ele, sec. 772, and authorities there cited.

5. *Haselett v. Woodruff* 150 Mo. 534, 51 S. W. 1048. *Rashall v. Ry. Co.* (1913) 249 Mo. 509, 155 S. W. 426. *Cherry v. Cherry* (1914) 258 Mo. 391 167 S. W. 539. *Wentz v. Ry. Co.* (1914) 259 Mo. 450, 168 S. W. 1166. *Orthwein v. Ins. Co.* (1914) 261 Mo. 650, 170 S. W. 885. See also notes 67 L. R. A. 3; 34 L. R. A. (N. S.) 268; 18 *Id.* 40.

even tho the common law on the subject may have been changed in Missouri. Thus in *Davis v. McColl*⁶ we find the court deciding a question relating to negotiable instruments according to the common law, as it existed in Missouri prior to the adoption of the Negotiable Instruments Act.

On the other hand, there is a class of cases where the courts will not presume that the common law is in force in a foreign state. It is obvious, of course, that if the foreign law is proved that there is no room for a presumption at all, and that the law as proved will prevail.⁷ Sometimes, however, there is no proof, but the court cannot make the presumption because of facts, of which it must take judicial notice. While courts do not take judicial notice of what the law of another state is on any given question, they do take such notice "of the system of law that is the basis of the jurisprudence of another jurisdiction."⁸ If this is the case, then it must be that if the court knows that another state is not one where the common law ever prevailed, because of that state's origin, it cannot presume that the common law is in force there. Accordingly, Missouri courts will not presume that the common law prevails in a state which, before it became a part of the Union was not subject to the laws and jurisdiction of England, or was not made subject to the same by an act of Congress.⁹ The reason for the rule is, as intimated, because the court cannot on any reasonable basis indulge in such a presumption in such a situation. The fact of the state's origin, which is known to the court, conclusively rebuts it.

Sometimes a question is properly determinable according to the law of a sister state, where the common law has never been in force but a statute in this State gives a similar right to that claimed by a plaintiff in his action. It has been held in this kind of a case that it will be presumed that the statutory law of the foreign state is the same as that of this State, there being no proof to the contrary.¹⁰ This rule has been

6. (1914) 179 Mo. App. 198, 166 S. W. 1113; see also *Bank v. Commission Co.* (1909) 139 Mo. App. 110, 120 S. W. 648. And *Brown v. Worthington* (1912) 162 Mo. App. 508, 142 S. W. 1082.

7. *Mathieson v. Ry. Co.* (1909) 219 Mo. 542, 118 S. W. 9. *Ham v. Ry. Co.* (1910) 149 Mo. App. 200, 130 S. W. 407.

8. Wharton on Conflict of Laws, Third Edition by Parmele, sec. 781 *et*

seq. The quotation is from Wharton at this point.

9. *Plato v. Mulhall* (1880) 72 Mo. 522; *Sloan v. Torry* (1883) 78 Mo. 623; *Wiascheck v. Glass* (1891) 46 Mo. App. 209; *Clark v. Barnes* (1894) 58 Mo. App. 667.

10. *Madden v. Ry. Co.* (1917) 192 S. W. 455; *Lee v. Ry. Co.* (1906) 195 Mo. 400, 92 S. W. 614; *Wyeth v. Lang Co.* (1893) 54 Mo. App. 147; *Barkdyt v Alexander* (1894) 59 Mo. App. 188.

severely critized, and has been said to be the equivalent of taking judicial notice of a foreign statute.¹¹

It having been shown that the court can, in certain cases, enumerated above, presume that the law of the foreign state is the same as that of the forum, the next question to be determined is: ought the court to make the presumption, if the petition of the plaintiff contains no allegation upon which the fact, if presumed, can be based? A presumption, according to Professor Thayer, is a process whereby a fact is taken for granted; given a certain state of facts, the law holds that another fact will follow from the former without proof; in other words, the ultimate fact, which is the one that it is desired to establish, will be presumed to exist. This assumption is made either because the law, by reason of some policy, believes that the fact ought to be taken as existing, or because human experience has found that the fact is usually a natural sequence from the facts upon which the presumption is based. As the learned author shows, a presumption then is a mere short cut taken to establish a fact, and the result of taking the short cut is that a fact is taken as proved without the labor of proving it.¹²

This being the nature of a presumption, it is urged that a court should never make one, and take a fact as proven through this method, unless the fact would have been admissible in evidence under the petition in the ordinary way. After all a presumption is only a substitute for proof; it is a method of taking a fact as proved. Accordingly, for this reason, it is submitted, no fact ought to be presumed unless it would be provable under the pleadings if there were no grounds for making the presumption. If a presumption is only a substitute for proof, is it not essential to have the same grounds for making the presumption that it would be essential to have to prove the fact, if no presumption could be made? This proposition, when the matter is considered, seems to be obvious enough and inevitable. While there is little authority on the general question, there is an analogous case in the Supreme Court of the United States which seems to support the writer's contention. In *Mountain View etc. Co. v. McFadden*¹³ it was urged by plaintiffs that the court ought to take judicial notice of a fact which was essential to plaintiffs' cause of action, but plaintiffs had laid no foundation for the proof of this fact in their pleadings. They had not alleged that the fact existed. The court conceded that it knew the fact to exist, but refused to take notice of it because plaintiffs had not chosen to rely on the existence of that fact as a part of their cause. Said the Court: "But the circuit court

11. Opinion of Woodson, J., in *Mad-den v. Ry. Co.* *supra* note 10, 192 S. W. 1. c. 458.

Evidence at the Common Law chap. VIII.

12. Thayer, Preliminary Treatise on

13. (1901) 180 U. S. 533, 21 Sup. Ct. Rep. 488.

could not make plaintiff's case other than they made it by taking judicial notice of facts which they did not choose to rely on in their pleading. The averments brought no controversy in this regard into court, in respect of which resort might be had to judicial knowledge." ^{13a} Now judicial notice is merely another case where the court will dispense with the proof of a fact, and take the fact known as proved; if the court knows a fact to exist, it will excuse the party from proving it; it is a short cut to establish a fact; it is a substitute for proof. But the court clearly holds that the short cut cannot be taken unless the fact could have been proven in the round-about-way; if the fact could not have been proved without judicial notice, then it will not be provable thru this method. It would seem that the decision is good law, and good sense, and that the principle adopted is altogether applicable to our problem. If this is the case, then it follows that the court will not make a presumption unless the pleading lays the foundation by properly alleging the fact, which is to be presumed to exist. For these reasons the decision in the principal case is believed to be sound. Conceding that presumptions can sometimes be made as to foreign law, still they ought never to be made unless the law desired to be presumed would be provable under the pleading.

While the writer has urged that the law of a foreign state ought always to be pleaded, and no presumption about it ought to be indulged in unless the pleading contains a basis for such a presumption, still the rule in some cases is *contra*. In Wharton on Conflict of Laws¹⁴ it is said that if the case is one where the court can either assume that the common law prevails in the foreign state, or that there is statutory law in the foreign state similar to that of the forum, then the plaintiff need not plead the foreign law, but the court will apply the law, which is presumed to exist. Some four cases are cited to sustain this rule, but the editor points out that the rule "is generally assumed by the cases on the subject," which is undoubtedly true. Why, however, this should be the rule is a matter as to which the cases leave one in the dark. It should not be the rule and if it is applied, it involves the violation of another fundamental rule to the effect that a man can only prove those matters that are comprised within the allegations of his pleading.

Suppose that the rule is as stated in the last paragraph, does the decision in the case under review conflict with the same? It is believed that it does not, for the reason that the court could not make any presumption as to the law of Texas. The court knew that Texas is not a common law state, or to use its expression, that Texas is not a state

13a. (1901) 180 U. S. 1. c. 535, 21 Sup. Ct. Rep. 488.

14. Wharton on Conflict of Laws, Third Edition by Parmele, sec. 781f.

where the "equitable doctrines of the common law" prevail. This being so, the court could not presume that "common law," or English equity existed in Texas. Nor is there a statute in Missouri, which gives a party a right to specific performance in a case like plaintiff's. So the court could not assume that the statutory law of Texas was the same as that of the forum. There was no statute in the forum giving a right to a plaintiff similarly situated. It is believed, therefore, that to this point the case is right on principle, and within the authorities, as well.

Occasionally it has been held that if the court cannot make a presumption as to the foreign law either because it knows that the common law cannot prevail in the foreign state, or because there is no statute in the forum, which gives a right similar to that claimed by the plaintiff to which the foreign law can be assumed to be similar, that the court will apply the law of the forum on the theory that it is the only law before it. Where the decision is to this effect, no presumption as to the nature of the foreign law is made at all, and the rule if it is to be justified at all, is based on the theory that "the parties by failing to prove the proper foreign law have impliedly agreed to abide by the law of the forum."¹⁵ This rule has been adopted in several Missouri cases¹⁶ and was urged by Blair, J., in his dissenting opinion in the principal case as one that might be acceptable.¹⁷ The propriety of these decisions might well be questioned. Is the agreement by implication to this effect? But even so, the decisions are not inconsistent with, or contrary to the principal case. It must be remembered that the only point decided in this case was that where a plaintiff's case depends on the law of a foreign state, that plaintiff's petition is not demurrer proof unless the same pleads the law of the foreign state. In all the cases cited, which apply the law of the forum for want of any other law to be applied, the defendant did not demur to the petition, but on the contrary joined issue and went to trial. This being the situation, the court might well have felt that the matter of pleading the foreign law might be regarded as waived. In fact in *Biggie v. Chicago etc. R. R.* ¹⁸ the court intimated that this was the rea-

15. Wharton on Conflict of Laws, Third Edition by Parmele, sec. 781d; the quotation is from the editor at this point.

16. *Flato v. Mulhall* (1880) 72 Mo. 522; *Philnot v. Ry. Co.* (1884) 85 Mo. 167 (*dictum*). *Thompson v. Ry. Co.* (1912) 243 Mo. 336. 148 S. W. 484; *Lynons v. Ry. Co.* (1913) 253 Mo. 143, 161 S. W. 726. *Biggie v. Ry. Co.* (1911) 159 Mo. App. 350, 140 S. W. 602. *McManus v. Ry. Co.* (1906) 118 Mo. App.

152, 94 S. W. 743. *Sterling v. Ry. Co.* (1914) 185 Mo. App. 192, 170 S. W. 1156.

17. (1919) 217 S. W. 1. c. 290.

18. (1911) 159 Mo. App. 1. c. 351, 140 S. W. 602. There is *dicta* to be found in other cases to the same effect. so in *Lee v. Ry. Co.* (1905) 195 Mo. 415, the court said: "By the strict rules of pleading therefore the plaintiffs in their petition should have stated the laws of Kansas applicable to the facts to

son why the court did apply the law of the forum, saying: "Defendant did not attack the petition by demurrer, nor plead in its answer that no cause existed under the laws of Iowa * * *." The statement clearly shows that the court felt that had the petition come up on demurrer that it might have been regarded as defective, just as the Supreme Court regarded the petition in the instant case in this light. While there may be some decisions in Missouri on some phases of this question which are not all that could be desired, still they are distinguishable from the principal case which is certainly correct and is a decided step in the right direction.

J. L. PARKS¹⁹

CHARITABLE TRUST—RULE IN *Morice v. The Bishop of Durham*. *Jones v. Patterson*.¹ Fannie R. Lytle by her will gave all her property in California and the rent of a 160 acre farm in Platte County, Missouri, to her husband for life, and at his death to be "placed" in the hands of the defendant, "to be used for missionary purposes in whatever field he thinks best to use it, so it is done in the name of my dear Savior and for the salvation of souls."

The court held this provision of the will invalid as being too indefinite and uncertain, both as to purpose and as to object because no particular form of the Christian religion was intended to be propagated or advanced, and because the scope of the field in which the trustee was empowered to exercise the charity was as unlimited as human thought "when applied to the determination of what constitutes a belief in the Christian religion." It was thought that no court could supervise the application of the fund, for it fixes upon no definite object, but in effect made the defendant the owner of the property. Consequently, the property descended to the testatrix's heir at law.

show that the deceased if he had lived could under that law have maintained an action for damages, and if timely objection to the petition had been made by demurrer or otherwise it would doubtless have been sustained * * *." Again in *Madden v. Ry. Co.* 192 S. W. 1. c. 456 the court said: "The courts of Missouri do not take judicial notice of the judicial decisions, or the statutory law of sister states * * *. Hence they can only be brought to the knowledge of the courts of Missouri where their consideration is essential to the

sustention of a cause of action or a defense by being both pleaded and proven by the party relying upon them."

19. In the preparation of this note, the writer has been furnished with the Missouri authorities by Lynn Webb Esq., LL. B., University of Missouri, of the Kansas City, Mo. Bar. Mr. Webb has also generously made some other useful suggestions but he is in no way responsible for the conclusions that have been reached.

1. (1917) 271 Mo. 1, 195 S. W. 1004

The law takes a different view with reference to private trusts and charitable trusts. The well recognized public policy of disapproving the tying up of property for long periods of time is rather strictly applied in the case of private trusts. Among the most noted examples is *Musset v. Bingle*,² where the interest on a sum of money was bequeathed for the perpetual upkeep of a monument to the testator's wife's first husband. This was held bad by the English court because it kept property out of commerce forever and also because it involved the perpetual upkeep of a non-charitable trust.

In the absence of a statute such gifts have been held invalid if the distribution of the trust fund extended beyond the period specified in the rule against perpetuities, viz: lives in being and twenty-one years thereafter.³

In dealing with bequests and devises for charitable trusts, however, a more liberal rule has been adopted, and trusts founded upon such bequests and devises are not invalid even tho they extend over long indefinite periods of time or even perpetually.⁴

The prevailing rule is that once the bequest is considered a charitable trust the elements of indefiniteness as to purpose and uncertainty as to object will not defeat the disposition, but the courts will uphold it and enforce it thru the Attorney-General.

In *In re Best*,⁵ a provision "for such charitable and benevolent institutions as the trustees shall determine," was upheld. In *Rickaby v. Nicholson*⁶ a provision for "such religious or charitable purposes as the trustee shall think fit," was held valid. Also, in *Everett v. Carr*⁷ a provision was held valid "for charitable purposes for the greatest relief of human suffering, human wants, and for the good of the greatest number." This bequest includes a field whose scope also is as unlimited as human thought, and conceivably gives more latitude than does the will in the principal case, yet the Maine court found no difficulty in sustaining the bequest. A like result was reached in *Salstonstal v. Saunders*,⁸ where the bequest was to trustees to hold and invest the same and appropriate so much of the whole of the principal and income as they might think proper, "to the furtherance of and promotion of the cause of piety and good morals, or in aid of objects and purposes of benevolence and charity, public and private, or temperance, for the education of deserving youths." The bequest was upheld as to all its provisions

2. (1876) 1 W. N. 170.

3. *Dawson v. Small* (1874) L. R. 18 Eq. 114; *In re Rogerson* (1901) 1 Ch. 715; *Burke v. Burke* (1913) 259 Ill. 262, 102 N. E. 293.

4. *Pell v. Mercer* (1885) 14 R. I. 412.

5. (1904) 2 Ch. 354.

6. (1912) 1 I. R. 343.

7. (1871) 59 Me. 325.

8. (1865) 11 Allen (Mass.) 446.

and the court announced that it would find means of supervising the trust.⁹ There are other decisions sustaining similar trusts.¹⁰ In *Miller v. Teachout*¹¹ the bequest was in trust, "to the advancement of the Christian religion in the trustee's judgment." The Ohio court experienced no difficulty in giving effect to the charitable intention of the testator.¹²

Walker, P. J., in the principal case, apparently cited *Morice v. The Bishop of Durham*¹³ for the proposition that the object of the trust must be sufficiently definite so that a court of equity can enforce the application of the trust fund in conformity to the expressed wishes of its creator. An analysis of that case, however, will show that it does not so hold. The trust created in the Bishop's case was a bequest to the defendant to dispose of the ultimate residue of the testatrix's estate to such objects of "benevolence and liberality" as the Bishop in his own discretion should approve. The court held the trust invalid because the words, "*benevolence and liberality*" were broader than the word charity. The objection was not that the bequest was indefinite and uncertain as a charity but that it was too broad to be a charity at all. The court in the principal case considers the gift as a charity and so considered, *Morice v. The Bishop of Durham*, *supra*, is no authority for holding this charitable trust invalid because of indefiniteness.

Another famous case relied upon by the court was *Tilden v. Green*.¹⁴ There Samuel J. Tilden left a large sum of money to a corporation not then in existence for the purpose of maintaining a free library and reading room in the City of New York, and such other educational and scientific purposes as the trustees should designate. This provision was held invalid because the will of the trustees and not the will of the

9. "If at any time hereafter doubt should arise as to the mode of distribution, or the trustees should exercise their discretion illegally or unreasonably, this court, upon bill or information, may control and regulate the administration of the charity."

10. *Jackson v. Phillips* (1867) 14 Allen (Mass.) 539; *Welch v. Caldwell* (1907) 226 Ill. 488, 80 N. E. 1014; *Pell v. Mercer* (1885) 14 R. I. 412; *Swasey v. American Bible Society* (1869) 57 Me. 523; *Coffen v. Attorney General* (1919) 231 Mass. 575, 121 N. E. 397; *Miller v. Tatum* (1918) 181 Ky. 490, 205 S. W. 557; *Re Welch* (1918) 105 Misc. 27, 172 N. Y. Supp. 349. "The mere fact that the purpose of a charit-

able trust is left indefinite is not fatal according to the better view and weight of authority, provided it is limited to charitable purposes." Austin W. Scott, 33 Harvard Law Review 695.

11. (1874) 24 Ohio St. 525.

12. *Re Dulle's Estate* (1907) 218 Pa. 162, 67 Atl. 49; *Selleck v. Thompson* (1907) 28 R. I. 350, 67 Atl. 425; *Re Stewart's Estate* (1901) 26 Wash. 32, 66 Pac. 148.

13. (1805) 10 Ves. 521. See also *Smith v. Pond* (1919) 107 Atl. (N. J. Eq.) 800, 29 Yale Law Journal 242.

14. (1891) 130 N. Y. 29, 28 N. E. 880; Ames, Lect. Leg. Hist. 285, 5 Harv. L. Rev. 389.

testator was made controlling. But the decision in that case has not stood the test of time. Two years later the legislature of New York passed an act which nullified the doctrine of the Tilden case.¹⁵ Later cases in New York dealing with trusts of this nature have regularly sustained them.¹⁶ Like statutory changes have taken place in Virginia,¹⁷ and Tennessee,¹⁸ and the prior decisions in those states,¹⁹ some of which are cited by the court in the principal case, must be considered as recalled.

In *Schmucker's Estate v. Reel*²⁰ it was held by the Missouri court that a trust, to be applied according to the best discretion of the trustee, must fail for uncertainty. But the decision is no weight in the solution of the present problem, for the reason that the gift was not for a charitable purpose. In such a case the rule in *Morice v. The Bishop of Durham* would properly apply.

In *Board of Trustees v. May*²¹ a portion of the testatrix's estate was given to a person "to use as he may desire in the master's work." In *Hadley v. Forsee*²² a bequest was made to the testator's wife "to advance the cause of religion and promote the cause of charity as the wife should think the most conducive to carrying out the testator's wishes." In both cases the gifts were held invalid because of uncertainty of the beneficiaries. But such is not the prevailing rule in the United States. Only Michigan, Minnesota, and Maryland²³ adhere to this view of charitable trusts. Furthermore, an attempt was made in Michigan in 1903 to change the rule by legislation, but the act was declared unconstitutional because of insufficiency of the title of the act. In West Virginia²⁴ it has been held that sec. 3 and sec. 10 of ch. 57, Code 1906 had changed the previous rule in that state (in accord with the old law of Virginia) as to charitable trusts.

It is submitted that the rule in Missouri, followed in the principal case,—is undesirable and unfortunate and that the Supreme Court of

15. Acts 1893, ch. 701.

16. *Matter of Cunningham* (1912) 206 N. Y. 601, 100 N. E. 437; *Roth-Schiff* (1907) 188 N. Y. 327, 80 N. E. 1030.

17. Va. Acts, 1914, p. 414, Code, sec. 1420.

18. Shannon's New Code, sec. 3530, a. 1.

19. *Carpenter v. Miller* (1869) 3 W. Va. 174; *Fifield v. Van Wyck* (1897) 94 Va. 557, 27 S. E. 446, 64 Am. St.

Rep. 745; *Reeves v. Reeves* (1880) 5 Lea (Tenn.) 644.

20. (1876) 61 Mo. 592.

21. (1906) 201 Mo. 360, 99 S. W. 1093.

22. (1907) 203 Mo. 418, 101 S. W. 59.

23. Ames, Lect. Leg. Hist. 285; 5 Harv. L. Rev. 389.

24. *Hays v. Harris* (1914) 73 W. Va. 17, 80 S. E. 827.

Missouri has not followed modern authority. A change of viewpoint might disturb certain titles but the balance of convenience is in favor of the change.²⁵

Moberly, Missouri.

DAVID P. JAMES²⁶

PLEADING—RIGHT OF PLAINTIFF TO AMEND AFTER JUDGMENT. *Swift et al v. Union Fire Insurance Company.*¹ The Supreme Court in the above case held that if a petition entirely omitted to allege a fact necessary to the statement of a cause of action, the defect is fatal and cannot be cured by amendment of the petition after rendition of a verdict, but a motion in arrest of judgment will lie.

The facts in the case are: A sued B upon a parol contract to insure A's house, alleging that the contract was upon the same terms as a previous policy which was set out in the petition. The petition omitted to allege consideration for the parol promise to insure. This defect was not objected to until after a trial upon the merits, which resulted in a verdict in favor of plaintiff. Then a motion in arrest was made. The trial court allowed the plaintiff to amend his petition and entered judgment upon the verdict for plaintiff.

Numerous authorities support the view that the allegation of consideration in a suit on a contract not importing a consideration is a necessary part of the cause of action.² It is one of those "radical constitutional defects" which is not cured by verdict,³ and can be taken advantage of by motion in arrest.⁴ Section 2774 R. S. Mo. 1909, makes it unnecessary to allege a consideration in certain classes of written contracts,⁵ but does not affect parol contracts.

In *Pa. Del. etc. Nav. Co. v. Dandridge*⁶ practically the same question arose as in the principal case. That was a suit upon a contract and no consideration was alleged. The court in sustaining a motion in arrest said: "The object of all pleadings is that the parties litigant may be mutually apprised of the matters in controversy between them. The declaration should substantially present the facts necessary to constitute the plaintiff's right of action, that the defendant being forewarned of

25. See *Klocke v. Klocke* (1919) 276 Mo. 572 1. c. 581, 208 S. W. 825.

26. Graduated from School of Law, April 1920. with degree of LL.B.—Ed.

1. (1919) 216 S. W. 935, 217 S. W. 1003.

2. 13 C. J. 722; *Pollard v. Hollander* (1909) 115 N. Y. Supp. 1042, 62 Misc. 523.

3. *Robinson v. Barbour* (1840) 5 Blackford (Ind.) 468.

4. *Pa. Del. & Md. Steam Nav. Co. v. Dandridge* (1836) 8 Gill & J. (Md.) 248, 29 Am. Dec. 543.

5. *Eyermann v. Piron* (1899) 151 Mo. 107 1. c. 115, 52 S. W. 229.

6. See note 4 *supra*.

the nature of proof to be preferred against him, may, if necessary be prepared to contradict, explain or avoid it."

There is another class of cases, presenting a situation somewhat analogous to the principal case, which frequently has been before the courts. The Missouri Supreme Court often has held that the plaintiff must decide what action he will bring, and once having elected, must clearly state and prove it.⁷ The plaintiff cannot allege a number of facts with no particular cause of action in view and then adopt his relief to his evidence.⁸ As was said by a learned Wisconsin judge, speaking of the petition provided for by the code, "It cannot be 'fish, flesh or fowl' according to the appetite of the attorney preparing the dish set before the court."⁹ The principle sustained by the decisions is that the function of a complaint is to place both parties on an equal footing. The idea should not be overlooked that the plaintiff is the actor calling the defendant into court and that it is his duty to state a cause of action "in plain and concise" language. This duty said Sherwood, J., in *Huston v. Tyler*¹⁰ "is the primary duty of the party drawing the pleading and the latter cannot cast that onus on his opponent by failing to perform his own duty in the first instance and that duty consists in expressing his meaning clearly and unmistakably."¹¹ The purpose of the decisions is to guard the right of the defendant to be informed of the issues, the nature and kind of proof required to rebut the plaintiff's case.

It is suggested that the rule announced in the principle case is justifiable on the same grounds. The defendant could not be informed of something which is omitted from the petition. He could not know the kind and nature of proof required of him. Tho the spirit of the code is to prevent failure of justice because of formal defects which do not injure or prejudice the rights of either party, yet the code did not relieve the plaintiff from clearly defining the issues by stating all the essential elements of his cause of action. The code did not change the substance of the different causes of action, but operated only on the form of pleading.¹²

7. *Huston v. Tyler* (1897) 140 Mo. 252, 36 S. W. 654.

8. *Carson v. Cummings* (1879) 69 Mo. 325. *Huston v. Tyler* (1897) 140 Mo. 252, 36 S. W. 654. *Henry Co. v. Citizens Bank* (1907) 208 Mo. 1. c. 226, 106 S. W. 622.

9. *Supervisors etc. v. Decker* (1872) 30 Wis. 624.

10. See note 7 *supra*.

11. *Young v. Schofield* (1896) 132 Mo. 650, 34 S. W. 1. c. 499. *Huston v. Tyler, supra*. *Clark v. Dillon* (1884) 97 N. Y. 370—cited with approval in *Young v. Schofield*.

12. *Sumner v. Rogers* (1886) 90 Mo. 324, 2 S. W. 476.

In *Kliefoth v. The Northwestern Iron Co.*¹³ the following rule for interpreting pleadings was announced: "In determining whether a complaint states a cause of action the question is not whether the plaintiff used the most appropriate language, but whether the language used will permit a construction which will sustain the pleading, and to that end such effect should be given to its allegations as will support rather than defeat it, if that can be done without adding, by way of construction, material words not necessarily implied, or giving to the language used a meaning that cannot be reasonably attributed to it." The above case involved the question of whether the allegations of a petition sufficiently connected the employment of a negligent servant with the act causing the injury. The Wisconsin Court while giving full scope to the doctrine of inference refused to infer an essential element. The effect of the decision is to limit the doctrine of inferring facts to formal necessary inferences and to hold the plaintiff to the duty of alleging all the essential facts.

In *Elwaine-Richards Co. v. Wall*,¹⁴ in sustaining the rule that plaintiff must allege all the essential facts the Indiana Court said: "For the rule recognized at common law and by our code affirms that material facts necessary to constitute a cause of action must be directly averred and cannot be left to depend upon or shown by mere recitals or inferences."

The Wisconsin and Indiana cases, *supra*, were decided upon demurrers. They do not decide the exact question involved in the principal case, yet they illustrate that the liberality of the code towards the plaintiff is not without limit.

The question of inferring facts has been before the Missouri Supreme Court several times and an examination of the cases reveals that it has drawn a distinction between a cause of action defectively set out and a defective cause of action.¹⁵ There would seem to be no objection to holding in the former case that a trial upon the merits will cure the defect. Perhaps no better statement of the rule can be found than that made by Gantt, P. J., in *People's Bank etc. v. Scalzo*:¹⁶ "If a material matter be not expressly averred in the petition, but the same is necessarily implied from what is stated in the context, the defect is cured after verdict, the doctrine resting on the presumption that the plaintiff

13. (1898) 98 Wis. 495, 74 N. W. 356.

14. (1902) 159 Ind. 557, 65 N. E. 753.

15. *McDermont v. Claas* (1891) 104 Mo. 1. c. 21, 15 S. W. 995. *Lynch v. The St. Joseph & I. Ry. Co.* (1892) 111

Mo. 1. c. 605, 19 S. W. 1114. *The Salmon Falls Bank v. Leyser* (1893) 116 Mo. 51, 22 S. W. 504. Bliss on Code Pleading (3rd Ed.) Sec. 438.

16. (1895) 127 Mo. 164, 29 S. W. 1032.

proved on the trial the facts imperfectly alleged, the existence of which was essential to his recovery." The principal case comes within the latter class. It is a defective cause of action, an entire omission to state sufficient facts and the question is not whether given a cause of action imperfectly stated, a trial upon the merits will cure the imperfections, but having none to start with, will the trial court manufacture one for the plaintiff. It is submitted, that the latter course would be unfair to the defendant.

A quick dispensing of justice would seem to demand that the issues be clearly and fairly stated. The Missouri Statute relating to amendments contains language capable of being construed more liberally,¹⁷ and standing alone it could have been interpreted to allow greater freedom to amend, but this could not have been done consistent with good pleading and the requirements of a principal section of the code requiring the plaintiff to make "a plain and concise statement of the facts constituting a cause of action without unnecessary repetition."¹⁸

Tho at first glance the decision of the principal case may seem to sacrifice justice for form, it is suggested that to hold otherwise would sanction loose pleading and compel defendant to surmise or infer the issues. In the very nature of things a party who is in possession of the facts should not be allowed to put upon his adversary the burden of badly drawn pleadings.

It is submitted that upon reason and authority, and in the interest of speedy and exact justice, the Supreme Court correctly refused to allow the plaintiff to amend his petition after judgment.

I. C. N.

BILLS AND NOTES—RENUNCIATION BY HOLDER. *Engle v. Brown et al.*¹ Defendants purchased a store building of plaintiff and gave in part payment a negotiable promissory note secured by a deed of trust on the building. Before the note became due defendant sold the building to one Lobdell, who assumed the note and mortgage and agreed to pay plaintiff. Plaintiff at the same time orally agreed with defendants to release them from liability on the note and accept Lobdell in their stead. Defendants resisted payment on the ground that the above transaction constituted a novation and discharged them from further liability on the note. The Kansas City Court of Appeals, while conceding the soundness of the defendant's contention prior to the enactment of the Negotiable Instruments Law, held that under Section 122 of that

17. Sections 2119 and 2120 R. S. Mo. 1909.

18. Section 1794 R. S. Mo. 1909.
1. (1919) 216 S. W. 541.

Act (R. S. Mo. 1909, Sec. 10092) the oral renunciation of the plaintiff, unaccompanied by a surrender of the instrument, was ineffective to release defendant.

It is the well settled common law rule in this country that a unilateral contract right can be discharged before breach only by a sealed instrument or by an agreement supported by a consideration. A mere verbal release without consideration is ineffectual.³ The English courts reached a different conclusion with respect to the obligation of parties liable on negotiable instruments, holding that such an obligation may be discharged by parol, without consideration, before or after breach.⁴ This doctrine was not, however, adopted by the great majority of American courts. In the absence of statute, negotiable instruments have, in this respect, stood in this country on the same footing with simple contracts, except in cases in which the bill or note was destroyed or surrendered for the purpose of discharging the debt.⁵ Such was the state of the law prior to the enactment of the Bills of Exchange Act and the Negotiable Instruments Law.

The rule as thus developed by the English courts was given statutory force in the Bills of Exchange Act, subject, however, to the qualification that the renunciation "must be in writing, unless the bill is delivered up to the acceptor."⁶

The author of the Negotiable Instruments Law adopted, in substance, the provision of the Bills of Exchange Act dealing with this subject. Section 122 of the Law (R. S. Mo. 1909, Sec. 10092) reads as follows:

"The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing unless the instrument is delivered up to the person primarily liable thereon."

2. Anson on Contract, Corbin's Edition, p. 479; *Collyer v. Moulton* (1868) 9 R. I. 90; *Garnsey v. Garnsey* (1917) 116 Me. 295, 101 Atl. 447. But see *Robinson v. McFaul*, (1854) 19 Mo. 549.

3. *Foster v. Dawber* (1851) 6 Exch. 839.

4. *Upper San Joaquin Irrigating Canal Co. v. Roach* (1889) 78 Cal. 552, 21 Pac. 304; *Rogers v. Kimball* (1898) 121 Cal. 247, 53 Pac. 648; *Smith v. Bartholemew* (1840) 1 Met. 276; *Bragg v.*

Danielson (1886) 141 Mass. 195, 4 N. E. 622; *Henderson v. Henderson* (1855) 21 Mo. 379; *Crawford v. Millspaugh* (1816) 13 Johns (N. Y.) 87. See also *Lowrey v. Danforth* (1902) 95 Mo. App. 441, 69 S. W. 39.

5. See Law Reports, Statutes, 45 and 46 Victoria, 1882, (Vol. XVIII), p. 383. Sec. 62 of the B. E. A. reads as follows: "(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against

In the case under review the parties effected what was substantially a novation. As a part of an oral transaction between plaintiff, defendant, and Lobdell, plaintiff promised to discharge defendant from his obligation as maker of the note, the consideration for this promise being Lobdell's promise to assume defendant's obligation. Had the N. I. L. not been in force, the court intimates there would have been a valid discharge. Does the above quoted section of this Act, which requires a "renunciation" to be in writing, render ineffective the discharge, before breach, of the maker of a promissory note upon an *oral* agreement supported by a consideration?

The few courts which have had occasion to pass upon this point since the adoption of the N. I. L. have answered the question in the affirmative. In *Whitcomb v. Nat'l. Exchange Bank of Baltimore*,^{5a} the defendant, accommodation indorser of a note, claimed that the payee of the note had orally released him in consideration of certain services performed by him in placing in the hands of the payee bonds as collateral security for the payment of the note, and resisted plaintiff's claim on the ground that this provision of the N. I. L. requiring renunciations to be in writing applied only to renunciations without consideration, and that therefore he was entitled to submit proof as to an oral agreement based upon a consideration. The court denied his contention, holding that the word "renunciation" comprehends the "surrender of a legal right" and that it not only "appropriately describes the act of surrendering a right or claim without recompense, but it can be applied with equal propriety to the relinquishment of a demand upon an agreement supported by a consideration." A similar view was taken by the Supreme Court of Washington in *Baldwin v. Daly*^{5b} the court holding that the word "renunciation" was used in the sense of a release, and that an accommodation endorser could not be released by an oral agreement, even tho such agreement was supported by a sufficient consideration.^{5c} In *Pitt v. Little*⁶ the same court held that in the absence of a written release of the sur-

the acceptor the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation."

See also Benjamin's Chalmers Bills, Notes and Checks, 2nd Am. Ed., pp. 245-6.

5a. (1914) 123 Md. 612, 91 Atl. 689.

5b. *Baldwin v. Daly* (1906) 41 Wash. 416, 83 Pac. 724.

5c. The term "renunciation," which is probably of civil law origin, is used both by civil law and common law writers to express the general idea of the surrender of a legal right, without regard to whether the surrender is gratuitous or paid for. Planiol, in his *Traite Elementaire de Droit Civil*, Vol. I, p. 889, in discussing the renunciation by a usufructuary of his right to usufruct, speaks of renunciations which are paid for and renunciations which are made

render of the note, the maker was not released. But in that case the presence of a consideration was not so clear.

Is there any basis for drawing the distinction suggested between gratuitous renunciations and renunciations supported by a consideration, so far as the requirement of writing is concerned? Can it be fairly contended that the N. I. L. contemplates a writing only in the case of a renunciation without consideration? It is submitted it cannot.

The obvious purpose of the statutory requirement that a renunciation be in writing is to secure a desirable mode of proof as to one of the methods of discharging a negotiable instrument. Section 122 of the N. I. L. deals with discharge by the method of renunciation, and the section provides that discharge by this method must be in writing unless "the instrument is delivered up to the person primarily liable thereon." Now if the purpose of the rule is primarily to secure a satisfactory mode of proof, is there, as a practical matter, substantially any less reason to require a renunciation for a consideration to be evidenced by a writing, than to require that a gratuitous renunciation should be so evidenced? It would seem not.

In this connection one possible source of difficulty should be pointed out. It will be noted that Sec. 119 of the N. I. L. (R. S. Mo. 1909, Sec. 10089) enumerates the various acts which will discharge a negotiable instrument. It stipulates that "a negotiable instrument is discharged.....(4) by any other act which will discharge a simple contract for the payment of money." So far as Section 119 is concerned, it does not require that any of the "acts" therein mentioned as sufficient to discharge a negotiable instrument be evidenced by a writing. Now it is, of course, obvious that the *oral* agreement in the case under review, supported, as it was, by a consideration, is sufficient to discharge a simple contract for the payment of money. Why, therefore, cannot the case be disposed of by Sec. 119, par. 4, of the N. I. L., and judgment given for the defendant? This very point was taken by counsel in *Whitcomb v. Nat'l. Exchange Bank*, *supra*, and ably disposed of by the court.⁷ The answer is that Section 119 of the Act confines itself to

gratuitously. Sherman, in Vol. II of "Roman Law in the Modern World" (pp. 161, 170, 177, 188), in discussing the various methods by which the different forms of servitudes may be extinguished, describes "renunciation" as "the voluntary surrender of the right of servitude to the owner." The term is used in a generic sense, and not in the special sense of the surrender of the right without compensation.

The term is used in this same generic

sense by common law writers to express the same idea. In Wood's *Byles on Bills and Notes* the author, on pp. 199-200, clearly indicates that the term is applicable to the surrender of a right on an instrument, whether there be consideration or not. To the same effect, see Story on Bills, s. 266. See also Gray v. McCune (1854) 23 Pa. St. 447, at 450.

6. (1910) 58 Wash. 355, 108 Pac. 941.

7. See *Whitcomb v. National Ex-*

enumerating certain acts which will operate as a method of discharge; among these acts is included, by implication, a novation, which, in turn, involves a renunciation supported by a consideration. Section 122, on the other hand, deals with renunciation as a method of discharge and prescribes a mode of proof for such method of discharge. Conceding that a renunciation for a consideration is one of the acts embraced in Sec. 119, par. 4, of the Act, must we not then look at Sec. 122, which deals specifically with renunciation as a method of discharge, for information as to what constitutes an effective renunciation?

For the reasons set forth, it is believed that the oral character of the renunciation in the case under review is fatal to the claim of the defendant, and that the court properly so held.

The discussion suggests a question not involved in the case under review, viz., the status of a written gratuitous renunciation. It is the generally accepted view that under the Bills of Exchange Act such a renunciation is good, altho there is little authority directly in point.⁸ Such a result would, however, seem beyond question. To make renunciation effective, consideration was, as we have seen, unnecessary under the English common law. The Bills of Exchange Act merely adopted the common law rule, adding the requirement that the renunciation be in writing. It has likewise been generally assumed that the same result follows in this country under the N. I. L.⁹ This assumption is also doubtless well founded. The English common law rule, which permitted an oral renunciation without consideration, was the rule of the law merchant,¹⁰ which knew nothing of consideration and which permitted an oral renunciation. The American courts added to this rule of the law merchant the common law requirement of a consideration. The English courts did not. The Bills of Exchange Act has merely added to the rule of the law merchant a requirement of a satisfactory method of proof. This affords a desirable working rule, permitting the holder to renounce his rights on an instrument without encountering the doctrine of consideration, and at the same time safeguarding the transaction by a satisfactory method of proof. It is believed that the N. I. L. should be so construed as to reach this result.

STANLEY H. UDY.¹¹

change Bank (1914) 123 Md. 612, 91 Atl. 689.

8. Benjamin's Chalmers Bills, Notes and Checks, 2nd Am. Ed., p. 245-6. See also *In re George* (1890) L. R. 44 Ch. Div. 627 and *Edwards v. Walters* (1896) 2 Ch. 157.

9. Williston, Cases on Contracts, Vol. II. p. 575 (5th paragraph of footnote beginning p. 574). See also *Leask et*

al v. Dew, (1905) 102 App. Div. 529, 92 N. Y. Supp. 891.

10. Story, Promissory Notes, p. 562 (footnote 3, paragraph 2); Woods' Byles on Bills & Notes, p. 199; Corbin's Anson on Contracts, p. 481.

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BAR BULLETIN

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PROPOSED CONSTITUTIONAL AMENDMENTS

It is proposed to amend Article 4 of the Constitution by inserting after the twenty-seventh line thereof the following:

9. On Judicial Candidates,
and by inserting at the end of the thirty-second line thereof the following:

The Committee on Judicial Candidates shall meet at the call of the chairman prior to the primary nomination or appointment of any person as a member of any state appellate or any federal court in this state. The chairman shall invite like committees of local bar associations in this state to join in the deliberations. The joint organization shall determine the advisability of making recommendations to the appointing power or to the voters in a primary election as to the fitness of judicial candidates. Such organization shall also consider means of securing men of proper qualifications as candidates for such offices. The report of the organization shall be given publicity prior to the appointment or primary election.

It is also proposed to amend Article 4 of the Constitution by inserting after the word "Treasurer" in the third line thereof the words,

"a secretary," and by striking out all of the fourteenth and fifteenth lines of Article 4.

CHARITABLE TRUSTS

AN ACT to make valid any gift, grant, devise, or bequest of property for charitable purpose despite the indefiniteness or uncertainty of the beneficiaries or objects, and to provide for vesting the legal title of property so disposed of.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI AS FOLLOWS:

Section 1. No gift, grant, devise, or bequest to religious, educational, charitable or benevolent uses, which shall in other respects be valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons, objects or institutions designated as the beneficiaries thereunder in the instrument creating the same, or because the party creating the trust has delegated to another the power or duty of determining what religious, educational, charitable or benevolent uses the money or property shall be devoted to. If in the instrument creating such a gift, grant, devise or bequest there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the circuit court having jurisdiction where the real property is located and in the case of personal property the circuit court having jurisdiction of the domicile of the trustor or, in the event that he is a non-resident, of the place where the personal property is located. The title shall remain in the circuit court until a trustee shall be duly appointed and qualified.

Section 2. All laws in conflict with the provisions of Section 1 are hereby repealed.

The above proposed act has been prepared with a view to correcting the unfortunate rule of law prevailing in this state which invalidates charitable trusts because of the indefiniteness of the purpose or object of the trust. The reader is referred to the review of *Jones v. Patterson*, page 53 of this bulletin.—Ed.

PROPOSED ADDITIONS TO CORPORATION LAW

Any corporation may, if so provided in its Certificate of Incorporation or in an amendment thereof, issue shares of stock (other than stock preferred as to dividends or preferred as to its distributive share of the assets of the corporation or subject to redemption at a fixed price) without any nominal or par value. Every share of such stock without nominal or par value shall be equal to every other share of such stock,

except that the Certificate of Incorporation may provide that such stock shall be divided into different classes with such designations and voting power or restriction or qualification thereof as shall be stated therein, but all such stock shall be subordinate to the preferences given to preferred stock, if any. Such stock may be issued by the corporation from time to time for such consideration as may be fixed from time to time by the Board of Directors thereof, pursuant to authority conferred in the certificate of incorporation, or if such certificate shall not so provide, then by the consent of the holders of two thirds of each class of stock then outstanding and entitled to vote given at a meeting called for that purpose in such manner as shall be prescribed by the by-laws, and any and all such shares so issued, the full consideration for which has been paid or delivered, shall be deemed full paid stock and not liable to further call or assessment thereon and the holder of such shares shall not be liable for any further payments under the provisions of this Chapter.

In any case in which the law requires that the par value of the shares of stock of a corporation be stated in any certificate or paper, it shall be stated, in respect of such shares, that such shares are without par value and wherever the amount of stock, authorized or issued, is required to be stated, the number of shares authorized or issued shall be stated, and it shall be stated that such shares are without par value. For the purpose of the taxes prescribed to be paid on the filing of any certificate or other paper relating to corporations and of franchise taxes prescribed to be paid by corporations to this State, but for no other purpose, such shares shall be taken to be of the par value of One Hundred Dollars each.

Within ten days after the issuance by the corporation of any of its shares of stock of no par value for property or cash, a statement, verified by the President and Secretary of the corporation showing the number of shares issued and the character, amount, and value of the property or cash received therefor, shall be filed with the Bank Commissioner of the State of Missouri. Failure to file the statement as herein provided shall be deemed sufficient grounds for the revocation of the certificate of incorporation.

It shall be lawful for any corporation organized under the laws of the State of Missouri, if it shall be so provided in its certificate of incorporation, to purchase or otherwise acquire, hold, and sell or otherwise dispose of shares of its capital stock and the shares of the capital stock of any other corporation, whether engaged in a similar business or not.

[The above has been proposed by Mr. Burr S. Stottle, 920 Commerce Building, Kansas City, Missouri, as the basis of needed legisla-

tion in this state. The proposal seeks to provide (1) for corporations with capital stock of no par value and (2) that corporations may acquire, own and sell the capital stock of other corporations without limitation.—Ed.]

JURY-EQUITY-TERMINOLOGY—We adopt this rule with all its rigor, but with a consciousness that juries in exercise of their equity powers do in practice correct many matters in which the law, by reason of its universality, is deficient.—Sturgis, P. J., in *Davis v. Springfield Hospital*, 218 S. W. 696.

If it is meant that the rule of law given the jury in certain cases is not followed and that the jury decides the case upon some other principle which is more just should this situation be tolerated as a satisfactory condition of our jurisprudence? Perhaps the rule of law is not the best rule that may be devised. Perhaps no general rule can be devised to meet justly all similar situations. Perhaps exceptions should be made. But do we improve our body of the law by leaving it to the jury to find a way, often upon no fixed principle, when the rule we have is not satisfactory?

Furthermore, if anything is to be gained by a scientific terminology it is difficult to understand how it will contribute toward legal science to write of the "equity powers" of a jury. Without doubt accurate legal terminology is a great aid to accurate thinking and the administration of justice.

BURDEN OF PROOF.—The burden was on the defendant to prove that the death under such circumstances was intentional and not accidental; that is, the burden would be upon the defendant, in a case of suicide, to prove that the insured was sane, and committed the act which took his life with the intention of committing suicide.—White, C., in *Andrus v. Business Men's Acc. Ass'n*, 223 S. W. 1. c. 74.

If the court meant "burden" in the sense of the duty of convincing the trier of the fact then the situation is that the plaintiff having pleaded that the death was by accidental means and the defendant having denied that allegation, still defendant would have the duty of convincing the trier of the facts that plaintiff's allegation—a necessary allegation—is not true. Such a result is anomalous. Are there not already enough anomalous situations in the law of insurance?

But the court may have meant to use the term "burden" only in the sense of going forward with the evidence. See note by J. A. Walden, Law Series 17, pages 64-65.

SELECTION OF JUDICIAL OFFICERS

In the State of New York, there is, in addition to the State Bar Association, a local bar association in each of the sixty-two counties.

The City of New York is comprised of five boroughs—Manhattan, The Bronx, Brooklyn, Queens and Richmond—co-terminous with the Counties of New York, The Bronx, Kings, Queens and Richmond, respectively. The Boroughs of Manhattan and The Bronx constitute the First Judicial District of the State of New York, and the Boroughs of Brooklyn, Queens and Richmond are included in the Second Judicial District. There is a County Lawyers' Association in each of these boroughs and in the Borough of Manhattan there are two bar associations—The Association of the Bar of the City of New York and the New York County Lawyers' Association.

The Association of the Bar of the City of New York, probably the oldest bar association in the United States, was organized in 1870 and has a membership of from 1700 to 1800. The New York County Lawyers' Association, of which the Hon. Charles E. Hughes, former justice of the Supreme Court of the United States, is president, was organized in 1908 and has a membership of about 3600. Many lawyers in the City of New York are members of both these associations.

The by-laws of the New York County Lawyers' Association provide for certain standing committees of the Association, including, among others, a Committee on Judiciary. (Article XI. Sec. 1). This committee consists of twenty-one members, divided into three classes of seven members each, appointed annually by the president for a term of three years. (Article XI. Sec. 2). The president, vice-president, secretary, and treasurer of the association are ex-officio members of this Committee and entitled to participate in its proceedings as members. (Article XI. Sec. 4). This Judiciary Committee, of which Hon. James A. O'Gorman, former United States Senator from the State of New York, is chairman, has, among other powers, the following:

"Prior to the fourth Monday in September in each year in which a judicial office is to be filled by election in the County of New York the Committee on Judiciary and the Directors shall meet on the call of five members of either, to decide whether a general meeting of the association shall be called for the purpose of determining whether the Association shall take any action in nominating candidates for such office or recommending candidates to the respective political parties for nomination. Said Committee and the Board of Directors acting as a joint Committee on Nominations shall make rules for the calling and conduct of such general meeting of the Association and for the voting thereat. Seven hundred and fifty members shall constitute a

quorum at such meeting. If at such meeting it shall be determined to nominate or recommend candidates for such office or offices, then an adjournment of the meeting shall be taken for not less than one week; at such adjourned meeting a like number shall constitute a quorum, and there shall be submitted at such meeting a printed ballot to be made up of candidates proposed by the Directors and Judiciary Committee of the Association acting as a Joint Committee on Nominations and also candidates nominated by petition of at least two hundred and fifty members of the Association, provided such nomination or nominations by petition shall have been given to the Chairman of the Directors forty-eight hours before the adjourned meeting. The ballot shall contain the names of persons so nominated alphabetically arranged and the office for which the nomination is made, distinguishing the nomination by the Joint Committee on Nominations, and the voting upon such ballot shall be by making a cross before each name voted for. The Candidates on such ballot chosen by two-thirds of the members present and voting at such meeting shall be the candidates of the Association; and if it shall be resolved to nominate candidates, the said Joint Committee on Nominations shall cause to be circulated the necessary petition for such nomination to be filed with the proper officers in order that the candidates may have a place upon the official ballot; and it shall select the party symbol and designation under which the said ticket shall appear on the official ballot when this shall be necessary under the form of ballot then existing, and do all other things necessary in the premises. The rules governing the voting at such adjourned meetings shall be made by the said Joint Committee." (Article XVII., Sec. 3).

"The Committee shall have power to consider the fitness of candidates nominated or proposed to be nominated for election or appointment to judicial office, and shall have the right to confer on that subject with other organizations. The Committee shall report its recommendations to the Board of Directors for such action thereon as the Board may deem advisable and the Board of Directors may also, in the case of candidates for appointment to judicial office, report its recommendations directly to any public officer charged with a duty in the premises upon request of such officer." (Article XVII., Sec. 4).

Pursuant to the foregoing powers, the Judiciary Committee of this Association, upon the occurrence of a vacancy in the Judiciary, or, in the event of an election both prior to and after nominations for judicial office have been made, considers the qualifications of prospective candidates or nominees, and embodies its recommendations in a report to the Board of Directors, which, after further consideration, takes such action as it deems advisable. (Article XVII. Sec. 4).

In exceptional cases preliminary steps are taken to secure the re-

nomination and re-election of judges whose records have been satisfactory. (Article XVII. Sec. 3.) Such action is taken at a general meeting of the Association called at the instance of the Committee on Judiciary and the Directors.

The Judiciary Committee of the Association of the Bar of the City of New York is vested with substantially similar powers and the two associations generally act in concert in these matters, the respective committees on the judiciary frequently co-operating very effectively.

The recommendations of this Committee are given a wide circulation in the public press throughout the State.

In this manner a wholesome influence is exerted upon the selection, as well as the election, of candidates for the Federal, State and local bench. Laymen are strongly influenced by the recommendations of the local Bar Association in respect to the qualification of candidates for judicial office, and the Associations, in turn, conscious of the reliance placed upon their recommendations by the laymen, strive conscientiously to prove themselves worthy of this responsibility. So desirable is the endorsement of these several associations, that executive officers enjoying the power of appointment to fill vacancies in judicial offices, as well as political organizations, usually assure themselves that a candidate for judicial honors will receive the endorsement of the bar associations interested, and a nomination that is sure to invite the opposition of these associations is rarely made and seldom successful.

The keen appreciation on the part of these associations of their responsibility in reporting upon the qualifications of candidates for judicial office is best evidenced by the personnel of these committees, consisting, in the case of the New York County Lawyers' Association, of the following members, many of whom are of national distinction:

COMMITTEE ON THE JUDICIARY

James A. O'Gorman	Chairman
Louis F. Doyle	Secretary

Class of 1920

Francis S. Bangs (deceased)	James A. Gorman
Louis Marshall	Alton B. Parker
Walter C. Noyes	George W. Wickersham
	Archibald R. Watson

Class of 1921

Lewis L. Delafield	Frederic C. Leubuscher
Job E. Hedges	David Leventritt
D. Cady Herrick	Thomas Thacher (deceased)
	James R. Sheffield

Class of 1922

Charles F. Brown	Charles E. Lydecker (deceased)
Edward S. Clinch	William M. K. Olcott
Louis F. Doyle	Henry Wollman
	Clarence J. Shearn

New York

LOUIS F. DOYLE

THE NEW YORK METHOD

The following excerpts from the report of the Committee on Judiciary of the New York County Lawyers' Association will demonstrate the method pursued in obtaining proper judicial officers in the State of New York. They should be considered in connection with the article by Mr. Louis F. Doyle and with the proposal for an amendment of the Constitution of the Bar Association to the end that the same excellent work may be accomplished in Missouri.

New York, October 14, 1919

To the Board of Directors of the

New York County Lawyers' Association:

The Committee on the Judiciary submits the following report:

The several political parties have now made their respective nominations for the offices of Justices of the Supreme Court of the First District, Surrogate of the County of New York, Justices of the City Court of the City of New York and Justices of the Municipal Court of the City of New York, to be filled at the approaching general election. The Committee on the Judiciary has considered the fitness of the candidates so nominated and respectfully reports to the board of directors its recommendations, as follows:

That, in the opinion of the Committee, each of the following named candidates is fitted by learning, character and professional experience for the office for which he has been nominated, and will, if elected, discharge the duties of his office with ability and fidelity:

Candidates for Justice of the Supreme Court.

Honorable Joseph E. Newburger, now a justice of the Supreme Court.

Honorable Robert L. Luce, now sitting by appointment as a Justice of the Supreme Court.

Irwin Untermyer, Esq., and

Philip J. McCook, Esq.

Candidates for Surrogate

Honorable James A. Foley, and
James O'Malley, Esquire.

* * * * *

Respectfully submitted

JAMES A. O'GORMAN, Chairman;

LOUIS F. DOYLE, Secretary.

Upon the presentation of the foregoing report at a meeting of the Board of Directors held October 22nd, 1919, the following resolutions were adopted:

Resolved that the report presented by the Judiciary Committee be, and the same hereby is, approved by the Board; and it is

Further resolved that in approving the report of the Judiciary Committee, the Board of Directors of the New York County Lawyers' Association reaffirms its adherence to the principle embraced in the resolution adopted by this board on April 3, 1919, to wit: 'The principle of retaining in office judges of experience and proved ability is now well established and has the hearty approval of this association and of the Bar and of the public generally,' and that the board of directors believes that this principle should be applied to the case of Mr. Justice Newburger and that of Mr. Justice Smith, and that they should be reelected.

On November 12th, 1919, the Committee again met and in the exercise of its power adopted resolutions, pursuant to which the following report was presented to the Board of Directors, which unanimously adopted the report at a meeting held November 12, 1919:

Whereas the designation of Mr. Justice Frank C. Laughlin as a Justice of the Appellate Division of the Supreme Court in the First Department expires on December 31, 1919; and

Whereas his judicial service as a Justice of the Supreme Court for the past twenty-four years, eighteen of which have been spent in the Appellate Division of this Department, has been distinguished by learning, industry, and unremitting devotion to the duties of his office; and

Whereas the ever increasing business of the Appellate Division of the First Department requires the services of able, trained and experienced judges; therefore be it

Resolved that the Judiciary Committee of the New York County Lawyers' Association respectfully recommends to Governor Smith the redesignation of Mr. Justice Laughlin on the expiration of his present term.

JAMES A. O'GORMAN, Chairman;
LOUIS F. DOYLE, Secretary.

At a meeting held on March 13th, 1920, the Committee considered the forthcoming vacancies in the Court of Appeals and made recommendations in regard thereto to the Board of Directors, which adopted the following resolutions at its meeting on April 1, 1920:

Resolved, that in respect to the two Judges to be elected to the Court of Appeals at the coming election, this Board strongly urges that nominations by the several political parties be made upon a non-partisan basis, and that the same candidates be nominated by all parties.

Further Resolved, that this Board recommends the nom-

ination as Associate Judges of the Court of Appeals, of Judges Frederick E. Crane and Abram I. Elkus, whose terms are about to expire, both of whom are in all respects well qualified for such office. —

(signed)

(signed)

Respectfully submitted,
JAMES A. O'GORMAN, Chairman
LOUIS F. DOYLE, Secretary.

SUBROGATION AND ASSIGNMENT—The principle governing subrogation is equity, while that governing assignment is law.—Ellison, J., in *Kansas City etc. v. Southern Surety Co.*, 219 S. W. 727.

Such a statement arouses interest. It ignores the vast amount of history lying behind assignment. "As will appear from the following section important consequences follow from the answer given to the question whether the assignee's right is legal or equitable. If the matter is looked at from a historical point of view it is obvious that the protection of the assignee's right has been largely due to courts of equity....." Williston on Contracts Vol. I, Sec. 446a.

Nor is the statement accurate if our present day law is alone considered.

".....It seems, therefore, that the authorities referred to in a preceding section holding that merely procedural changes have been effected by modern statutes are sound and that the assignee's right should still be regarded as equitable in the sense of being governed and defined by the principles originally established by courts of equity." Williston on Contracts, Vol. I. Sec. 447.

HIGHEST QUALITIES DEMANDED—The Supreme Court's power as the ultimate law giver puts too heavy a strain upon ordinary men. Since it is, as we are constantly told, an extraordinary power it demands extraordinary men to exercise it. We shall never face the issues until there is a general recognition of the fact that the Supreme Court in cases of public concern is not exercising ordinary judicial powers but powers that demand qualities deeper and different from those possessed by ordinary judges. They are the deeper problems of statesmanship. They require for their disposition either men like Chief Justice Marshall, the late Mr. Justice Moody, or Mr. Justice Hughes, who came to the court after wide and far-sighted experience in affairs; or that rarer type, men like Mr. Justice Holmes, who are gifted with imagination to transcend their own limited experience.—The New Republic, Vol. XXII, No. 281.

AN UNFORTUNATE DISSENT

I cannot help but feel that the dissent of Mr. Justice Holmes, in which Mr. Justice Brandeis concurs, in *Jacob Abrams et al. v. United States*, decided by the Supreme Court of the United States, November 10th, 1919, is a most unfortunate one.

Abrams and his fellow conspirators were prosecuted under the Espionage Act; in count 1 for unlawfully uttering etc. "disloyal, scurrilous and abusive language about the form of government of the United States;" and in count 2 language "intended to bring the form of government of the United States into contempt, scorn, contumely, and disrepute;" and in count 3 language "intended to incite, provoke, and encourage resistance to the United States in said (the war with Germany) war;" and in count 4 with conspiring "when the United States was at war with the Imperial German Government, * * unlawfully by utterances, etc. to urge, incite and advocate curtailment of production of things and products, to-wit: ordnance and ammunition, necessary and essential to the prosecution of the war."

Abrams purchased a printing outfit which was concealed in a basement room where the printing was done at night. The circulars were distributed secretly in New York City, some of them being thrown from a window of a building where one of the defendants was employed.

There were five defendants and the majority opinion states that they were intelligent, had had considerable schooling and had lived in the United States for terms varying from five to ten years, but none had ever applied for naturalization.

The majority opinion also states that four of the defendants testified frankly that they were "rebels," "revolutionists," "anarchists," having no *belief* in government of any form and no *interest* whatever in the government of the United States. That the fourth defendant testified that he was a "socialist" and believed in a proper kind of government, but not in *our* government, which he termed as "*capitalistic*."

One of these inflammatory articles printed and disseminated by this "gang" is headed "The Hypocrisy of the United States and her Allies," and after the use of most abusive language, ends with these ringing paragraphs:

"The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine!"

"Yes, friends, there is only one enemy of the workers of the world and that is CAPITALISM."

"Awake! Awake, you Workers of the World!"

And the circular is signed "Revolutionist."

Obviously, as the majority opinion points out, this is "clearly an ap-

peal to the 'workers' of this country to arise and put down by force the government of the United States, which they characterize as their 'hypocritical,' 'cowardly,' and 'capitalistic' enemy."

The circular above referred to was published in English. Another circular was published in Yiddish and the translation of the heading is "Workers—Wake up."

In this circular the President is referred to as "his Majesty, Mr. Wilson, and the rest of the gang; dogs of all colors!" And therein the following occurs:

"Workers, Russian emigrants, you who had the least belief in the honesty of *our* government, must now throw away all confidence, must spit in the face of false, hypocritical, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war."

It was admitted on the trial of the case that the reference in the quotation last made was to the Government of the United States.

Another sentence in this circular is as follows:—

"Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom."

Further on in this same circular we find the following:—

"Workers, our reply to the barbaric intervention (referring to the presence of the Allied Armies on Russian soil) has to be a general strike! An open challenge only will let *the government* know that not only the Russian Worker fights for freedom, but also *here in America lives the spirit of Revolution.*"

And further we find the following:—

"Do not let *the government* scare you with their wild punishment in prisons, hanging, and shooting. We must not and will not betray the splendid fighters of Russia. Workers, up to fight."

(The italics are mine.)

This circular is signed "The Rebels."

There were other circulars just as inflammatory and abusive, cleverly designed to provoke discontent in the minds of the "workers" and to kindle and fan into flame a spirit of resentment toward, and intolerance of, the Government of the United States.

All five of the defendants were convicted below, and the case was affirmed on appeal in an opinion by Mr. Justice Clarke, from which (as

heretofore noted) Mr. Justice Holmes and Mr. Justice Brandeis dissented.

I presume dissents are necessary because human minds in administering justice, as in every other walk of life, arrive, and honestly so, at different conclusions; but the dissenting opinion of Mr. Justice Holmes in this case is to my mind unfortunate and indeed deplorable. It would have been far better if the two non-concurring justices had merely announced their dissent; that would have been regrettable, but when the ground of the dissent is, that the conviction of these men, based upon the preparation and dissemination of the circulars involved, is a violation of that provision of our Constitution protecting freedom of speech, the result approaches a positive menace to society and this Government.

One of the points made by Mr. Justice Holmes and relied upon in support of his dissenting view, is, that under count 4, which it will be recalled charged the defendants with conspiring when this Government was at war with Germany and in uttering, writings, urging, inciting and advocating the curtailment of production of ordnance and ammunition, necessary and essential to the prosecution of the war, it was necessary to make the conduct criminal, that there should be proved an intent on the part of the defendants to cripple or hinder the Government in the prosecution of the war by the effort to influence workers in ammunition factories to curtail the production of bullets, bayonets and cannon. And in that connection he indulges in this refinement of argument:

"I am aware, of course, that the word 'intent' as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used actually, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. *It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, altho there may be some deeper motive behind.*

"It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success; yet, even if it turned out that curtailment hindered and was thought by other minds to have been ob-

viously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime. I admit that my illustration does not answer all that might be said, but it is enough to show what I think and to let me pass to a more important aspect of the case."

(The italics are mine.)

I seriously object to coupling, even by the way of illustration, a patriot with the defendants in this case, and I am not surprised that the writer of the language quoted should have had doubts of the soundness of his argument, as is evident from his admission therein.

I am unable to conceive how a man with the antecedents, education, learning, attainments and experience of the learned author of this dissenting opinion can refer to the circulars involved as "a silly leaflet" and later as "poor and puny anonymities."

Equally untenable in my opinion is the argument of the learned justice in respect to the third count, which it will be recalled charged an intent "to incite, provoke and encourage resistance to the United States in said war."

His conception of the statute is that:

"Resistance to the United States means some act of opposition, to some proceeding of the United States in pursuance of the war. I think the intent must be the specific intent that I have described, and for the reasons that I have given I think that no such intent was proved or existed in fact. I also think that there is no *hint* at resistance to the United States, as I construe the phrase."

(The italics are mine.)

But even more to be regretted is the following statement of the learned Justice:

"In this case sentences of twenty years' imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much *right to publish as the Government has to publish the Constitution of the United States* * *."

(The italics are mine.)

The deliberately planned vagaries of the defendants are by the learned Justice elevated to the dignity of a "*creed*" which he states he believes to be the result of ignorance and immaturity.

When it is remembered that the conspiracy charged was hatched and carried into full fruition with the utmost cunning and acumen, carefully guarding at every point the danger of discovery, it becomes impossible for me, at least, to agree that these men were ignorant or that their vagaries or beliefs were the result of immaturity.

I cannot close without quoting from the concluding paragraph of this remarkable dissenting opinion.

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

I confess great difficulty, in fact inability, to comprehend exactly what is meant by the language just quoted, but I assume that thereby is meant that "rebels" and "revolutionists," as these defendants admitted themselves to be, can advertise themselves as such, can speak and write anything which their fertile brains can conjure up, no matter how abusive of, and derogatory to this Government it may be, and yet they cannot be punished under the Espionage Act until they lay their hands actually upon the throat of the Government itself.

If that is a correct interpretation of the existing law, it is high time that a law be written which will prevent the perpetration of such outrages.

The conception of the defendants' acts and motives, as expressed by the majority opinion, is in my judgement not only more logical and reasonable, but is the only conclusion which can legitimately and properly flow from the facts.

I quote but one sentence, altho the whole opinion should and could be read with great profit.

"These excerpts (taken from the circulars involved) sufficiently show that while the immediate occasion for this

particular outbreak of lawlessness on the part of the defendant alien anarchists may have been resentment caused by our government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country, for the purpose of embarrassing and if possible defeating the military plans of the government in Europe."¹

In West Publishing Company's docket for February, March, 1920, the opinions in this case are printed with a head note to the effect that the radical and revolutionary forces (which are unfortunately actively at work in this country and as we all know ready to grasp at anything and every thing lending color to their efforts) are making use of this dissenting opinion as a justification for their propaganda.

Of course, the "Rebels" and "Revolutionists" will be quick to seize upon this dissenting opinion and every phrase therein, and send it out as propaganda to their fellows, thus destroying in large measure the beneficial result of the conviction of these defendants and the otherwise salutary effect of the affirmance of that conviction by a majority of this great court.²

Kansas City, Missouri.

C. W. GERMAN

NOTES:

1. Mr. Zechariah Chafee, Jr., states in 33 *Harvard Law Review* 758-759, that the "excerpts" had reference not to the articles which were the foundation of the prosecution but to two manuscripts taken from the person of Lipman and from a closet in Abrams' rooms. Lipman and Abrams were two of the defendants.—Ed.

2. *Abrams v. United States* is reported in 250 U. S. 616, 40 Sup. Ct. Rep. 17. The decision has been the subject of comment in 33 *Harvard Law Review* 442, 33 *id* 747, 29 *Yale Law Journal* 337, 6 *Journal American Bar Association* 28, and in an article by Dean Wigmore which appeared early this year in the *Illinois Law Review*. The general subject was ably discussed by Honorable A. J. Beveridge in an address before the American Bar Association in St. Louis, August, 1920.—Ed.

PARTNERSHIP TENURE—According to our conception of the law, it is immaterial whether the grantees in the deed from Finch to Joseph A. Smith et al., dated March 13, 1873, be considered as tenants in common or co-partners.—Mozley, C., in *Allison v. Cemetery Caretaking Co.*, 223 S. W. 1. c. 43. One might think that the Commissioner had the view that there is such a thing as a distinct partnership tenure. Professor Mechem has advocated such a view, but most prefer to say that partners hold real estate as tenants in common. Bates on Partnership, Sec. 280.

REPORT OF COMMITTEE ON LEGAL EDUCATION AND AD-
MISSION TO THE BAR

To the Missouri Bar Association:

At each session of the Bar Association since 1916 the committee on Legal Education and Admission to the Bar has in its reports hearkened back to, approved and reiterated, a most exhaustive, elaborate and careful report made by Judge Goode as chairman of the committee in 1916. A careful study of the report of 1916, and its various reiterations since that date, has convinced your present committee that the report of 1916 could hardly be improved, and that the work of this committee might be concluded by simply recommending to the Association that the 1916 report be adopted again. However, we deem it advisable to point out the prominent features of the report of 1916 and to call briefly to attention the several prominent recommendations it contained. These briefly summarized are as follows:

1. That a general education equivalent to the completion of a four year course in a standard first class high school should be required.
2. That at least three years of professional education, obtained, either by attendance in a law school, or by studying in a law office, should also be required.

The report referred to further recommends that Common Law Pleading be dropped from the list of examination subjects, and that the required fee of applicants for examination be increased from ten to twenty dollars.

We are agreed that the present requirement as to general education is ridiculously insufficient. Under Section 940 Revised Statutes for 1909, an applicant for license to practice law is required only to complete the course in a grade school, or to have acquired education equivalent thereto. This means an applicant for admission to the Bar need only have the same general education that is now generally and ordinarily obtained by the average child at fourteen years of age. This is a condition which should not be longer tolerated. If reason ever existed for such loose requirements, it certainly no longer exists. It is inconceivable that any person desiring to practice law cannot readily obtain the high school education. Standard first class high schools are to be found in practically every community in the state, often two or three in a single county. We recommend therefore that Section 940 be so amended as to provide that all applicants for admission to the Bar shall prove that they have acquired general education equivalent to that obtained by the completion of a four year standard first class high school course.

Your committee fully concurs in that part of the report of 1916 which recommends additional requirements in the matter of professional

education. At present there is no required time fixed for professional study. If one is able to do so, he may within three to six months read law and be admitted to the Missouri Bar. This is an intolerable condition. It opens the way, and places a premium on mere stuffing for an examination, the primary purpose being merely to enable the applicant to pass the Bar examination, and absent the purpose of fitting himself for professional life. The people of the state are interested in a competent professional class and this can not be had so long as the way to the Bar is as easy as it now is. There is no demand or need in Missouri for more lawyers but a demand and need for better trained lawyers, and the state, in the interest of the whole people, should enact such laws as will produce a competent class of lawyers rather than such laws as will permit anyone, who has the desire, to practice before the courts. A situation should be created that when one is admitted to practice law there will be reasonable assurance that he is fairly competent to transact the business which may come to his office. Your committee is therefore of the opinion that the legislature should by statute require that applicants for license to practice law should furnish proof that they have had at least three years of professional education, obtained, either in a law school or in studying in the office of a lawyer. It is our further opinion that the law school or the lawyer to which the student turns for his professional education should be approved by the Supreme Court of the State.

In this connection we are reminded that in most of the states of the union a period of study in a law school or in a law office is required of an applicant for admission to practice law. In twenty-four states, the District of Columbia, Hawaii, and the Philippine Islands a period of three years of study in a law school or in an office is required. In nine states and in Porto Rico two years of study is required. This was the situation in 1916, and while your committee has not examined the statutes of the various states to discover what changes, if any, have been made in the past four years, yet it knows of no state lowering its requirements, and it is highly probable that some states have raised their requirements. It will appear that Missouri is lagging behind in its regulation of the practice of law.

Your committee therefore, while calling particular attention to certain recommendations of the 1916 report, desires to recommend that the Bar Association again go on record as approving said last named report and its several recommendations.

While this association has repeatedly approved the recommendations of the 1916 report, nothing has ever been done to secure the needed legislation. The association has apparently been satisfied with mere approval, and has taken no active steps toward securing what it has declared to

be a needed reformation. Your present committee, in the hope that definite results may be obtained, has prepared a bill, hereto annexed and made a part of this report, embodying the recommendations herein made, the same to be submitted to the Legislature for passage, provided it meets with the approval of the association.

Respectfully submitted—E. L. ALFORD, *Chairman*, O. M. BARNETT, JOHN T. STURGISS, EUGENE MCQUILLEN, JAMES A. PARKS.

AN ACT TO REPEAL SECTION 940, REVISED STATUTES OF MISSOURI, 1909, RELATING TO QUALIFICATIONS OF APPLICANTS FOR ADMISSION AND LICENSE TO PRACTICE AS ATTORNEYS AT LAW, AND TO ENACT A NEW SECTION IN LIEU THEREOF.

Be it enacted by the General Assembly of the State of Missouri as follows:

Section 1. That Section 940 of the Revised Statutes of Missouri, 1909, relating to qualifications of applicants for admission and license to practice as attorneys at law, be and the same is hereby repealed and a new section enacted in lieu thereof to be known as Section 940, and to read as follows:

Section 940:—Every applicant for such admission and license must be at least twenty-one years of age, of good moral character and a resident of this state. Every such applicant, in addition to furnishing proof of his compliance with the above qualifications, must also have actually and in good faith acquired a general education substantially equivalent to that obtained by the completion of a standard first class high school course of study, and shall possess fair knowledge of history, literature and civil government. Every such applicant shall have completed a course of professional study of law in a law school, such course of study to consist of at least three years of not less than thirty weeks each year, with at least ten hours of class room work in each week, such law school to be approved by the Supreme Court of the State. Provided that in lieu of such course of study in an approved law school the applicant may furnish satisfactory evidence that he has actually and in good faith studied law in the office and under the instruction of a practicing lawyer for at least three years of ten months each, and that he has devoted substantially all of such time to the study of the subjects upon which he shall be examined, as provided in section 944. In all cases the lawyer with whom the applicant purposes to study law shall first be approved by the Supreme Court, as such instructor, and upon such conditions and under such regulations as such Court shall prescribe.

TENTATIVE PROGRAM FOR
MISSOURI BAR ASSOCIATION, 1920.
STATLER HOTEL, ST. LOUIS.

Friday, December 3rd.

MORNING SESSION.

Address of welcome (some St. Louis man)
Response (man to be selected)

President's address.

Luncheon.

AFTERNOON SESSION.

Address (Hon. Bainbridge Colby has been invited)
No reply yet.

Address "The Constitution and the Courts"
Judge John Turner White, Supreme Court Commissioner.
Reports of committees, discussion and miscellaneous business.

EVENING SESSION.

Smoker by St. Louis Bar Association (speakers not yet chosen)

Saturday, December 4th.

MORNING SESSION.

Address Judge Harry Olson, Chief Justice of the
Municipal Court of Chicago.

Nomination of officers.
Committee reports.

AFTERNOON SESSION.

Memorials.
Miscellaneous business.

EVENING SESSION.

Annual Banquet
Principal speaker.....Hon. Fred Dumont Smith, Hutchinson, Kansas.

(The above was based on information at hand October 20.—Ed.)

THE UNIVERSITY OF MISSOURI BULLETIN

VOLUME 22

NUMBER 9

LAW SERIES 21

BAR BULLETIN

LARCENY OF REFERENDUM PETITIONS

BY

KENNETH C. SEARS

NOTES ON RECENT MISSOURI CASES



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MARCH, 1921.

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Larceny of Referendum Petitions

In the Green County Criminal Court was heard and determined *State of Missouri v. Richard McCulloch*.¹ The indictment was in three counts and omitting formal phraseology was in the following language:²

"Richard McCulloch and Bruce Cameron,³ on the fifteenth day of June, one thousand nine hundred and eighteen, at the city of St. Louis, aforesaid, into a certain building of Daniel K. Catlin, Theron E. Catlin, Irene C. Allen and Julius Pitzman, there situate and being, which said building was then and there occupied and used for offices, feloniously and burglariously, forcibly did break and enter, with the felonious intent then and there and thereby feloniously and burglariously to steal, take and carry away certain goods, wares, merchandise, other valuable things and personal property in the aforesaid building then and there kept and deposited; and in said building three hundred and sixty-nine (369) paper pamphlets, each of which pamphlets contained eight (8) leaves, and upon the first leaf of each of which said pamphlets was printed as a title thereof the following words, to wit:

" 'Petition for Referendum on United Railways Compromise Bill,' of the goods, wares, merchandise, other valuable things and personal property of one Edward H. Heilman, of the value of twenty-two dollars and eighty-seven (\$22.87) cents, in the aforesaid building then and there being found, then and there feloniously and burglariously did steal, take and carry away, with the felonious intent then and there to permanently deprive the owner of the use thereof, and to convert the same to their own use, against the peace and dignity of the State.

1. The author has been furnished the briefs prepared in the cause by both plaintiff and defendant. Acknowledgment is here made to Honorable Lawrence McDaniel and Honorable Elliott W. Major for their kindness.

2. Brief for plaintiff, pp. 2-5.

3. Bruce Cameron was apparently granted a severance.

"And the grand jurors aforesaid, upon their oath aforesaid, do further present that Richard McCulloch and Bruce Cameron, on the fifteenth day of June, one thousand nine hundred and eighteen, at the City of St. Louis, aforesaid, into a certain building of Daniel K. Catlin, Theron E. Catlin, Irene C. Allen and Julius Pitzman, there situate and being, which said building was then and there occupied and used for offices, and which said building was then and there tenanted by and in the possession of one Edward H. Heilman, feloniously and burglariously, forcibly did break and enter, with the felonious intent then and there and thereby feloniously and burglariously to steal, take and carry away certain goods, wares, merchandise, other valuable things and personal property in the aforesaid building then and there kept and deposited; and in said building three hundred and sixty-nine (369) paper pamphlets, each of which pamphlets contained eight (8) leaves, and upon the first leaf of each of which said pamphlets was printed as a title thereof the following words to wit:

" 'Petition for Referendum on United Railways Compromise Bill,' of the goods, wares, merchandise, other valuable things and personal property of the said Edward H. Heilman, of the value of twenty-two dollars and eighty-seven (\$22.87) cents, in the aforesaid building then and there being found, then and there feloniously and burglariously did steal, take and carry away, with the felonious intent then and there to permanently deprive the owner of the use thereof, and to convert the same to their own use; against the peace and dignity of the State.

"And the grand jurors aforesaid, upon their oath aforesaid, do further present that Richard McCulloch and Bruce Cameron, on the fifteenth day of June, one thousand nine hundred and eighteen, at the City of St. Louis, aforesaid, into a certain building of Edward H. Heilman, there situate and being, which said building was then and there occupied and used for offices, feloniously and burglariously, forcibly did break and enter, with the felonious intent then and there and thereby feloniously and burglariously to steal, take and carry away certain goods, wares,

merchandise, and other valuable things and personal property in the aforesaid building, then and there kept and deposited, and in said building three hundred and sixty-nine (369) paper pamphlets, each of which pamphlets contained eight leaves (8), and upon the first leaf of each of which said pamphlets was printed as a title thereof the following words, to wit:

“ ‘Petition for Referendum on United Railways Compromise Bill,’ of the goods, wares, merchandise, other valuable things and personal property of the said Edward H. Heilman, of the value of twenty-two dollars and eighty-seven (\$22.87) cents, in the aforesaid building then and there being found, then and there feloniously and burglariously did steal, take and carry away, with the felonious intent then and there to permanently deprive the owner of the use thereof, and to convert the same to their own use, against the peace and dignity of the State.

“Lawrence McDaniel,
“Circuit Attorney.”

It will be observed that the indictment charged both burglary in the second degree and larceny.⁴ A demurrer to the indictment was overruled but after the plaintiff had presented its testimony a so-called demurrer to the evidence was sustained. Presumably a verdict of acquittal was directed for defendant.⁵ It will be assumed that the testimony established (for the purpose of a directed verdict) the fact that referendum petitions as specified in the indictment were stolen and that there was also written on the petitions the ward, precinct, name and residence of each signer and that an affidavit and acknowledgment was attached to each petition.⁶ It followed, therefore, that the basic

4. R. S. Mo., 1909, Sec. 4520, 4528.

5. See note by R. E. Murray, p. 25.

6. Hon. Elliott W. Major, counsel for defendant, wrote the author as follows: “On the trial the evidence upon the part of the state was that nothing was taken except duly signed and acknowledged referendum petitions. These referendum petitions had printed thereon the ordinance being referred, the ward, precinct, name and residence of each signer and an acknowledgment and affidavit attached to each petition making same complete in every respect.”

question involved was whether the referendum petitions under the evidence were subject matter of larceny. Judge Orin Patterson decided the question in the negative and gave the following opinion.⁷

"JUDGE PATTERSON: Well, gentlemen, the Court has decided to put its conclusions about this demurrer in writing.

"It would take a rather extended opinion to adequately discuss the decisions at law that are involved in the demurrer to the evidence. In this written statement that the court has prepared of its conclusions there is no attempt to adequately discuss the law applicable to the case. It, as you will find when I read it to you, represents merely the conclusions of the court about the law that is applicable to this case. It is as follows:

"One of the essential elements of the charge of burglary in this case is an intent to steal. The things that were taken were referendum petitions. There is a statute that makes a bill introduced in either branch of the Legislature the subject of larceny. There is no statute that makes a referendum petition the subject of larceny.

"Whether the wrongful taking of referendum petitions is evidence of an intent to steal or constitutes larceny depends on whether or not referendum petitions are personal property. The referendum petitions, when taken, were in the custody of Mr. Proske, one of the five committeemen. They were to be filed with the Election Commissioners of St. Louis the following day. They were signed by more than 10,000 voters of St. Louis. They contained an application to the Board of Aldermen of the city of St. Louis to repeal an ordinance known as the United Railways Compromise bill, or to refer that ordinance to the voters of St. Louis for their rejection or approval.

"The purpose of the referendum petitions was a purely public purpose of a legislative nature.

7. The copy of the opinion was furnished by Circuit Attorney McDaniel, counsel for plaintiff. It agrees with the report of the decision in the St. Louis Post-Dispatch for September 8, 1920, except that the newspaper report omits the first two and unimportant paragraphs.

"The committeemen for the petitioners, the circulators and the signers of petitions were acting in a legislative capacity to accomplish that purpose. When the referendum petitions were taken, they were operative for that purpose alone. When the things taken became petitions they ceased to be pamphlets or blank referendum petitions dedicated to the use of accomplishing the repeal of a law.

"They were therefore written instruments because they represented an operative obligation. Under the common law written instruments were not the subjects of larceny. Under section 4927 of our statutes only such written instruments as affect pecuniary obligations or such written instruments as affect title to property are personal property and, as such property, the subject of larceny. Referendum petitions operative only for a public purpose of a legislative nature are not within this statute. Anything to be property must be something of some appreciable pecuniary value.

"Property is something that is the subject of ownership about which the owner can do practically as he pleases—burn it or otherwise destroy it if he wants to.

"It is something that the owner can sell or trade. Generally it is something that the owner can devise, or that goes to his heirs at his death. Referendum petitions lack all of these attributes of personal property. The idea of ownership of referendum petitions would be inconsistent with their legislative purpose. They are therefore public documents because devoted solely to a public purpose and are not the subject of larceny. For the above reasons the demurrer is sustained."

HISTORICAL BACKGROUND

This statement appears in the opinion, *supra*: "Under the common law written instruments were not the subjects of larceny." No doubt the court's conviction was the result of the brief furnished by defendant's counsel. At least that point of view was urged again and again in the brief for defendant.⁸

8. Brief for defendant, p. 72, concludes as follows: "When the state

It is believed that the authorities in England relating to the subject matter of larceny justify no statement that includes within the term "written instruments" more than (1) written instruments concerning lands in such a manner as to be said to "savour" thereof and (2) choses in action.⁹

A review of the authorities in England becomes necessary. The following may not be complete but every English decision with any real bearing on the question that has come to the attention of the writer is included.

Coke published his Institutes¹⁰ in 1628 and uttered the following: "It is said (?) though they be personal goods, yet if they savour anything of the realty, no larceny can be committed of them." Among the illustrations of his doctrine he gave, unfortunately, this example: "So it is of a box or chest with Charters, no larceny can be committed of them, because the Charters concern the realty, and the box or chest though it be of great value, yet shall it be of the same nature the Charters be: of and *omne majus dignum trahit ad fe minus.*"¹¹

He seems not to have dealt with the question of choses in

says it is a charge for stealing paper only, the answer comes, that the state in describing the things stolen, has described written instruments and documents, which have absorbed the paper, and in their higher character, as such written instruments, are not the subject of larceny at common law or under the statutes. The paper cannot be separated from the writing and the state is foreclosed."

9. It might be pointed out that most instruments "savouring" of land are also choses in action.

10. Coke's Third & Fourth Institute p. 109. Mr. Justice Stephen in his excellent "History of the Criminal Law of England" gives a summary of the treatment of larceny by the earlier writers—Glanville, Bracton, Britton, Mirror—and it seems safe to say that the problems here considered had not then arisen. Vol. III, pp. 129-136.

11. "During the reign of Edward IV. many points connected with the law of larceny were raised and discussed.

"One of the most curious occurred in 1471. It is referred to by Coke as 10 Edw. 4, 14, but is described in the Year-book as 49 Hen. 6, p. 14, No. 9.

"William Wody was indicted for stealing six boxes with charters and muniments relating to real property. After much debate this was held, before all the justices in the Exchequer Chamber, not to be felony. The reasons seem to have been, partly because the deeds were not chattels but were of the nature of real property, and partly because they had no definite assignable value. As to the boxes, it was argued, and the court

action until he delivered the opinion in *Calye's* case.¹² There, by the sheerest *dictum* it was stated that felony could not be committed of "charters, evidences, obligations, deeds, specialties, etc." Aside from the inference that might be drawn from the doctrine as to charters concerning realty this seems to have been the first appearance in English law of the doctrine that a chose in action was not the subject of larceny.¹³

In 1678 Hale published his *Pleas of the Crown*.¹⁴ He stated the law as follows: "Therefore of chattels real no felony can be committed, and therefore the taking away of a ward cannot be felony, nor of a box or chest of charters, that concern land." In a note it is added:¹⁵ "Nor can felony be committed of bonds, notes, or other writings that are securities for a debt, because they

seems to have adopted the argument, that the boxes were of the same nature as the deeds contained in them. This appears to me to be one of the most pedantic and unmeaning decisions in the whole law." Stephen, *History of the Criminal Law of England*, Vol. III, pp. 138-139.

12. (1584) 8 Coke 63.

13. "The Year-books do not refer to *choses* in action other than deeds. There is no decision that a bond, for instance, which did not affect land was incapable of being stolen. Coke, however, who accepted any sort of principle laid down in the Year-books as if it was a law of nature, accepted this principle and applied it to all *choses* in action whatever. In *Calye's* case he gives an elaborate commentary on the writ in the Register which defines the liability of innkeepers for the goods of their guests. Some of its words, he says, 'extend to all moveable goods, although of them felony cannot be committed, as of charters, evidences, obligations, deeds, specialties etc.' The only authorities quoted for this incidental statement are the case in the Year-book 10 Edw. 4, 14, which has been already noticed, and which says nothing of any documents except title-deeds to land; FitzHerbert, *Indictments*, 19; and Broke, *Corone*, 155 (it should be 154); both of which are mere abridgments of the case in the Year-books. Hence the doctrine that a *chose* in action cannot be stolen, which has for its consequence the absurd conclusion that a bank note cannot be stolen, rests upon no foundation except a wholly unauthorized extension made by Coke, in treating of a different subject, of a case in the Year-books, which was itself apparently an invention of the judges in the fifteenth century, resting, moreover, upon a principle which does not apply to documents not relating to lands. In the present day it would be too late to dispute this doctrine, as it has been implicitly recognized by a great deal of legislation founded upon it." Stephen, *History of the Criminal Law of England*, Vol. III, p. 144.

14. "Coke and Hale repeat the earlier authorities but add little to them." Stephen, *History of the Criminal Law of England*, Vol. III, p. 141.

15. Hale's *Pleas of the Crown*, Vol. I, p. 510.

derive their value from *choses en action*, which cannot be stolen." ¹⁶

In 1716 Hawkins published his Treatise of the Pleas of the Crown¹⁷ and addressing himself as to "what are such goods, the stealing whereof may amount to felony" he stated (1) "They ought to be no way *annexed to the freehold*;" and (2) "they ought to have some worth in themselves, and not to derive their whole value from the relation they bear to some other thing, which cannot be stolen, as paper or parchment on which are written assurances concerning lands, or obligations, or covenants, or other securities for a debt or other *chose in action*."¹⁸

Blackstone, in his commentaries, published in 1765, extends the doctrines no further. ".....Upon nearly the same principle the stealing of writings relating to a real estate is no felony, but a trespass; because they concern the land, or (according to our technical language) *savor of the realty*, and are considered as part of it by the law, so that they descend to the heir, together with the land which they concern.

"Bonds, bills, and notes, which concern mere *choses in action* were also at the common law held not to be such goods whereof larceny might be committed, being of no intrinsic value, and not

16. "It is obvious that it is physically impossible to misappropriate a right of action against the world at large, such as the copyright of a book or a patent to an invention, though it is possible to infringe and so to diminish or destroy its value. It is equally obvious that it is physically impossible to misappropriate a right of action against a particular person. No one can steal a debt, or a share in a partnership, or stock in the funds, but this ought to be coupled with the observation that there is no difficulty in misappropriating things which are valuable only as the symbols of debts or other liabilities, such as promissory notes, bonds, bank-notes, share and stock certificates." Stephen, History of Criminal Law in England, Vol. III, pp. 125-126.

17. Book I, ch. 33, Secs. 34, 35.

18. Hawkins states the reason for this doctrine to be that "they being of no manner of use to any one but the owner, are not supposed to be so much in danger of being stolen, and therefore need not to be provided for in so strict a manner as those things which are of a known price, and everybody's money." Such may have been good social policy at one day but unfortunately as social and economic conditions changed, the rule did not except by statutes.

importing any property in *possession* of the person from whom they are taken."¹⁹

In East's Crown Law²⁰ the doctrines of the earlier common law were summarized as follows:

"As larceny cannot be committed of things real at common law, neither can it be committed of charters or other written assurances concerning the realty, because they savour of the same nature; or as some writers say, because they are not in themselves of any value; though Lord Coke and Staundford give the same rule as to the box or chest in which they are kept, to which the latter reason would not apply."²¹

"In order to make the stealing of goods felony, they ought to have some worth in themselves, and not merely from their relation to some other thing: and therefore bonds, bills, notes, and other securities, which concern mere choses in action, were not the subjects of larceny at common law, being of no intrinsic value, and not importing any property in possession of the person from whom they are taken."²²

So far nothing appears to indicate that there was any belief among the earlier writers of conceded authority that larceny was impossible of a written instrument as such.

Next must be considered the development of the law through the modern cases. First will be considered cases involving instruments concerning real estate and then instruments which at least resemble choses in action and finally what may be designated as public documents or instruments.

19. 4 Blackstone's Commentaries, Lewis' Ed., p. 234.

20. Vol. II, Ch. XVI, Secs. 34, 36.

21. East's Crown Law, Vol. II, p. 596.

22. East's Crown Law, Vol. II, p. 597.

INSTRUMENTS SAVOURING OF REALTY

In *Rex v. Westbeer*²³ the prisoner was indicted for theft of a parchment writing, purporting to be a commission empowering the commissioners therein named to enter and ascertain the boundaries of certain manors and "to certify how high the water of *Furnace Pool* ought to be kept" and also a parchment writing, purporting to be a return made to the commission. The jury returned a special verdict that the defendant was guilty of taking away "a parchment writing, value *one penny*, from the records in the Court of Chancery" and "another parchment writing annexed thereto, value *one penny*." It was objected on behalf of prisoner (1) that being records the indictment ought to have been on 8 Hen. VI. c. 12 S. 3²⁴ and (2) "that they concerned the realty and could not become the subject of larceny, from their constructive adherence to, and connection with the freehold." The court considered only the second point and "were unanimously of opinion that these parchment writings concerned the *realty*, and that therefore the prisoner was not guilty of the felony charged in the indictment."²⁵

William Powell was charged with burglariously breaking and entering the dwelling-house of David Williams with intent to steal "goods and chattels" therein. The prisoner had borrowed two sums of money of Williams and had executed two mortgages in fee of freehold land to Williams. The sums loaned were un-

23. (1739) 1 Leach's C. C. 12.

24. "III And moreover it is ordained, That if any Record, or Parcel of the same Writ, Return, Panel, Process, or Warrant of Attorney in the King's Courts of Chancery, Exchequer, the one Bench or the other, or in his Treasury, be willingly stolen, taken away, withdrawn, or avoided by any Clerk or by other Person, because whereof any Judgment shall be reversed, that such Stealer, Taker away, Withdrawer, or Avoider, their Procurators, Counsellors and Abettors thereof indicted, and by Process thereupon made thereof duly convict by their own Confession, or by Inquest to be taken by lawful Men, whereof the one half shall be of the Men of any Court of the same Courts, and the other half of other, shall be judged for Felons, and shall incur the Pain of Felony. (2) And that the Judges of the said Courts of the one Bench or of the other, have Power to hear and determine such Defaults before them, and thereof to make due Punishment as afore is said."

25. *Rex v. Westbeer* (1739) 1 Leach's C. C. 12 l. c. 14.

paid and Powell entered with intent to steal the mortgage deeds. The conviction was quashed,²⁶ the court saying:

"This finding makes it unnecessary to consider whether the securities savour of the realty or are evidence of the title to real estate so as not to be the subject of larceny, because, being subsisting securities for the payment of money, they are clearly *choses in action*, and, as such, are not properly described in the indictment as goods and chattels."²⁷

CHOSSES IN ACTION

In *Rex v. Clark*²⁸ the prisoner was charged with the theft of a large number of promissory notes issued by the firm of Messrs. Large and Son and made payable at Brown, Cobb & Co., in London. The notes in question had been paid and when stolen were in a parcel directed to Messrs. Large & Son. The latter firm was permitted by act of parliament to reissue the notes for three years. In consequence of the loss they would be compelled to issue other notes with other stamps. The indictment charged the stealing of (a) promissory notes and (b) "pieces of paper" stamped with a stamp "of a certain value." At a meeting of "all the judges" the conviction under (b) was held proper since "the paper and stamps, particularly the latter, were valuable to the owners."²⁹

26. *Regina v. Powell* (1852) 2 Denison's C. C. 403.

27. *Regina v. Powell* (1852) 2 Denison's C. C. 403, l. c. 410.

See *Regina v. Williams* (1852) 6 Cox's C. C. 49, where a mortgage deed and title deeds accompanying it were held subject matter for larceny within 7 & 8 Geo. 4., C. 29, S. 5., making it a felony to steal "any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever, for money or for payment of money."

28. (1810) Russel & Ryan 181.

29. *Rex v. Clark* (1810) Russel & Ryan 181 l. c. 183. See II Russel on Crimes, 9th Ed., p. 269, note: "If a chattel be valuable to the possessor, though not saleable, and of no value to anyone besides, it may still be the subject of larceny."

Compare this statement in the opinion of Judge Patterson, *supra*: "Anything to be property must be something of some appreciable pecuniary value." That view seems indefensible as a matter of principle. If one has possession of an object that is valuable to him alone and valu-

In *Rex v. Vyse*³⁰ the prisoner was tried for receiving with guilty knowledge certain stolen property described in the indictment as (1) thirty pieces of paper and (2) thirty valuable securities.³¹ Whitehead and Co., bankers, had issued 1£ promissory notes. As these were paid by Glyn & Co. in London they

able for any reason peculiar to him there is need of protecting him in that possession. Otherwise, society ceases to function in a matter of social importance and the individual is tacitly invited to use his physical strength even tho it endangers the public order. There is neither time nor space to fully examine this phase of the law of larceny but the following decisions are believed to be representative of the English law.

Regina v. Godfrey (1838) 8 Car. & P. 563: Indictment for theft of (1) six sheets of paper and (2) a paper parcel containing two letters. Alexander, for prosecution, stated in opening statement that prisoner opened package and letters, read them, and "then disposed of them in such manner as he thought proper." Lord Abinger, C. B., directed an acquittal evidently thinking that the trespass must be done with intent to gain some advantage. But *quaere*. Decision may be justified. No showing that prisoner converted the letters. In *Regina v. Jones* (1846) 1 Denison's C. C. l. c. 196, Bros for the crown, stated: "*R. v. Godfrey*, 8 C. & P. 563, seems not to be law."

Regina v. Jones (1846) 1 Denison's C. C. 192, 2 C. & K. 236. Prisoner took letter addressed to another person and burned it in order to prevent the possibility of an unfavorable recommendation from the person to whom the letter was addressed. Held, larceny. Sufficient advantages to prisoner without admitting any necessity for *lucri causa*. In argument, Bros for the Crown stated: "The definitions of larceny in the Mirror, Bracton, Coke's Institutes, Lord Hale, Mr. Sergeant Hawkins, and Lombard,—none of them contain the words '*lucri causa*;' and Mr. Justice Blackstone is the first who introduces them, and the definition of larceny given by Mr. Serjeant Russel is taken from Justinian."

Regina v. Privett and Goodhall (1846) 1 Denison's C. C. 197. Prisoners were servants of prosecutor and apparently took their master's oats and secreted them in a loft for purpose of giving to their master's horses and without intent of applying to their own benefit. Held, larceny even tho no *lucri causa*. "Two of eleven judges dissented because no intent to deprive owner of property in goods."

Regina v. Wynn (1848) 1 Denison's C. C. 365, 2 C. & K. 859. Prisoner, employee in postoffice, made mistake with reference to sorting two letters containing money and to avoid a supposed penalty attaching to his mistake secreted the letters in a water closet with intent to destroy them. Held, larceny.

In applying the above to the opinion rendered by Judge Patterson it is to be remembered that the indictment alleged that the paper pamphlets were of the value of twenty-two dollars and eighty-seven cents and there is no statement that the plaintiff failed to give evidence to prove this allegation.

30. (1829) 1 Moody's C. C. 218.

31. The first count charged: "That he, - - - , thirty pieces of paper of great value, towit, of 30£ each, the said pieces of paper being

were wrapped up in bundles and labeled. About forty of these bundles in a bag were stolen from one of the partners of Whitehead and Co. It appears to have been possible for Whitehead and Co. to reissue such paid notes. Ten judges held the conviction right, some of them "doubted whether the notes could properly be called valuable securities; but, if not, they all thought they were goods and chattels."³² It seems that the correct point of view as to this case was uttered by Maule, J., in *Regina v. Watts*: "The notes were nothing but paper until re-issued, because they derived their whole operation from being delivered to some one."³³

At *nisi prius* was determined *Rex v. Mead*.³⁴ The defendant was indicted for embezzling (a) "pieces of paper of the value of one penny and (b) 'pieces of paper partly written and partly printed,' bearing stamps, the values of which were specified." The proof was that the articles stolen were "halves of country bank notes." The sentence of the prisoner was justified on the ground that the halves might have been of value to prosecutor "by his putting the two halves together."³⁵

John Atkinson on his way home was rushed upon, knocked down and beaten till he was disabled. The prisoners then rifled

stamped with a stamp, value 5d., the same being the stamp directed and required by the statute in such case made and provided, on every promissory note for payment to the bearer on demand for every sum of money not exceeding 1£ 1s., of the goods and chattels of John Whitehead and others, lately before stolen, etc., - - - feloniously did receive - - - said pieces of paper so stamped, and each and every of said stamps being then available and of full force and effect, against the statute, etc." The third count was for "feloniously receiving on the same day at the same parish, thirty valuable securities commonly called promissory notes, each of the said valuable securities being for payment to the bearer on demand of the sum of 1£ and the value of 1£ of the property of John Whitehead and others" etc. *Rex v. Vyse* (1829) 1 Moody's C. C. 218.

32. *Rex v. Vyse* (1829) 1 Moody's C. C. 218 l. c. 223.

33. (1854) 6 Cox's C. C. 304 l. c. 306.

34. (1831) 4 Car. & P. 535.

35. Counsel for prisoner argued that "these halves of country bank notes were not goods and chattels. If the notes had been entire, they would have been *choses in action*, not goods and chattels; but, in their present state, they were of no value."

his pockets and when Atkinson "came to himself" he missed a "slip of paper" "which contained a memorandum of a sum of money which a person owed him." The prisoners were indicted for robbing John Atkinson of 'one piece of writing paper of the value of one penny, one other piece of paper, of the value of one penny, and one written memorandum, of the value of one penny, of the goods and chattels of the said John Atkinson.' They were found guilty at *nisi prius*, Gurney, B., declaring: "If anything was taken away from the prosecutor by violence, however insignificant its value, that is sufficient to constitute robbery. In cases of robbery, the value is immaterial, and the prosecutor, by carrying this memorandum in his pocket, showed that he considered that *it was of some value to himself*."³⁶ (Italics supplied.)

In *Regina v. Murtagh*³⁷ the prisoner was indicted for theft of "one half of a certain promissory note for the payment of money, to wit, for the payment of the sum of twenty pounds, which said one half of the said promissory note was numbered 4432, of the goods and chattels of one James Savage." During the argument before submitting the case to the jury the statement was made that the article was one half of a Bank of Ireland note and it was urged that the indictment was defective in failing to allege that the article had a value. In arresting the judgment following a verdict of guilty, however, Doherty, C. J., placed his decision on the basis that the article was "a mere *chose in action*, and of no intrinsic value."³⁸

It is possible to reconcile this case with *Rex v. Mead*, *supra*, if it be assumed that in the preceding case a half of a bank note

36. *Rex v. Bingley and Law* (1833) 5 Car. & P. 602. No consideration was apparently given to the possibility that the memorandum was a chose in action, or more properly, evidence of a chose in action. Perhaps this was the result of a tendency by the English courts to limit the unfortunate *dictum* of Lord Coke.

37. (1840) 1 Crawf. & Dix 355.

38. See *Rex v. Johnson* (1815) 3 M. & S. 539 l. c. 550: "The subject of this indictment is bank notes which were not the subject of larceny at the common law, because they fell under the denomination of choses in action." (*dictum*)

could not be redeemed and that it ceased to be a valuable security by reason of being only a half.

In *Regina v. Perry*³⁹ the indictment was in several counts, two of which were for stealing (1) an order for the payment of money and (2) 'one piece of paper of the value of one penny.' The Great Western Railway Company in order to pay a debt drew a check at Paddington upon their London bankers and sent it to the superintendent at the Taunton station. The latter handed it to the chief clerk with orders to pay it to the overseer. The chief clerk converted the same and later cashed it with a tradesman in Taunton and applied the proceeds to his own use. Counsel for defendant (chief clerk) raised the point that the cheque was void for failure to have a stamp affixed thereon. Thirteen judges held the conviction right "as, at all events, there was a stealing of a piece of paper, which was sufficient to sustain a count for larceny."⁴⁰

During the argument of the case the following occurred:⁴¹

"Cresswell, J.—If a blank cheque were stolen, would that be larceny?

"Rowe.⁴²—I think it would.

"Cresswell, J.—Then is it less the subject of larceny for being filled up?

"Rowe.—That is the doctrine laid down in Hawkins, as I understand it."

"Alderson, B.—Suppose an autograph of great value written on a sheet of paper, would that prevent it from being the subject of larceny?"⁴³

39. (1845) 1 Car. & K. 725, 1 Cox C. C. 222.

40. *Regina v. Perry* (1845) 1 Car. & K. 725 l. c. 729.

41. *Regina v. Perry* (1845) 1 Cox's C. C. 222 l. c. 224. Compare: *Regina v. Walter Watts* (1850) 2 Denison's C. C. 14. (a cancelled cheque fraudulently destroyed by a clerk. Held guilty of stealing a "piece of paper." That such was subject-matter of larceny not controverted. Discussion concerned distinction between larceny and embezzlement.)

42. Counsel for defendant.

43. The report of the case in 1 Car. & K. 728 has the following: "W. C. Rowe.—It appeared to me that the effect of converting the paper into a cheque was to make it valuable, if at all, as a security for money,

In *Regina v. Boulton*,⁴⁴ a prosecution for false pretenses, it was held that an ordinary coupon railway ticket was a chattel within the meaning of the statute punishing false pretenses. Aside from the criticism of the decision for reasons not important here⁴⁵ it has been suggested that the court overlooked the fact that the ticket was only evidence of a contract by the railway to carry the holder.⁴⁶

In the well considered case of *Regina v. Watts*⁴⁷ it was held that larceny could not be committed where the subject matter was a written agreement signed by prosecutor and prisoner, whereby the latter had agreed to build two cottages for prosecutor. At the time of the alleged theft work was going on under the agreement and although prisoner had been paid all that was owing to him still it was an executory agreement.⁴⁸ The prisoner had been convicted of stealing a *piece of paper* and the prosecution

and that, the moment the paper had a cheque written upon it, it became a chose in action, which is not the subject of larceny. Alderson, B.—The nature of the paper is not so wholly absorbed in the chose in action as you put it."

44. (1849) 1 Denison 508.

45. *Regina v. Kilham* (1870) 11 Cox's C. C. 561.

46. Stephen, Digest of the Criminal Law, p. 250, note 2. Compare: *Regina v. Rodway* (1841) 9 Car. & P. 784: Prisoner owed his landlord rent. Latter prepared, signed and stamped a receipt and demanded payment. Prisoner permitted an examination of receipt. Then he paid only part of amount due and went away. Apparently assumed that receipt was subject to larceny. Coleridge, J. thought prisoner guilty but jury returned verdict of not guilty.

Regina v. Frampton (1846) 2 C. & K. 47. Facts same in effect as in *Regina v. Rodway*, except the stamped paper was produced by prosecutor, handed to prisoner who wrote out the receipt. Then it was signed by all concerned, prisoner keeping one finger on it all the time. Prisoner walked away with receipt without making payment. Wightman, J., directed an acquittal distinguishing *Regina v. Rodway* because prosecutor never had possession of receipt "in a complete state." *Quære* as to distinction.

Regina v. Smith (1852) 2 Denison's C. C. 449. Charged with larceny of receipt duly stamped of payment of money. Conviction quashed because receipt not in possession of prosecutor. Apparently assumed by all that receipt was subject-matter for larceny.

47. (1854) 6 Cox's C. C. 304.

48. "Martin, B.—And an action might be maintained upon it for not building according to the specification." 1. c. 306.

"As to this not being a chose in action, because all that was due had been paid upon it, it appears that the agreement is still executory,

attempted to avoid the rule that evidence of a *chose in action* could not be the subject of larceny by urging (1) that all due under the agreement had been paid and (2) that the want of a stamp prevented it from being a *chose in action*. The conviction was reversed, however, by the concurrence of ten judges. Parke, B., dissented because the paper remained paper until the instrument had been perfected by affixing a stamp.⁴⁹ There seemed to be no disagreement that the actual written agreement could have been stamped at any time before offered in evidence. In the particular case the written agreement could not be produced and secondary evidence was offered. Platt, B., effectively answered Parke, B., by saying: "It would, surely be strange to hold that it was no agreement until it was stamped, when the necessity for a stamp arises from its being an agreement."⁵⁰ All except Parke, B., seem to have thought that the paper in question was the evidence of a chose in action and therefore within the general rule.⁵¹

The indictment in *Regina v. Morrison*⁵² was in four counts: (1) larceny of a warrant for delivery of a watch; (2) of a pawn-broker's ticket; (3) of a piece of paper; and (4) for receiving all knowing them to have been stolen. The prisoner was con-

and might be used by either side to prove their rights." Lord Campbell, C. J. 1. c. 307.

This point, i. e. the agreement still executory, seems to have been ignored in the discussion of the case in the brief for defendant, p. 21.

49. Lord Campbell ruled at the outset of the argument that the stamp laws applied to criminal cases. 1. c. 305.

50. (1854) 6 Cox's C. C. 304 1. c. 309.

51. II Russell on Crimes, 9th Ed., makes the following comment on the decision: "The matter of the agreement was of the value of twenty pounds or upwards, and therefore by law required a stamp, but as between the parties to it, it would be available as an agreement without a stamp, but no evidence was given on either point." Compare: *Rex v. Yates* (1827) 1 Moody's C. C. 170. Charge of obtaining "an order for the payment of the sum of 2£," by false pretenses. Proof that prosecutor sent "a check drawn upon Messrs. Child & Co. payable to D. Francis Jones for 2£." Held that "order was not a valuable security within 7 & 8 G. 4, as it ought to have been stamped and therefore the banker would have subjected himself to a penalty of 50£ by paying it." Observe that there was no count for obtaining a piece of paper.

52. (1859) Bell's C. C. 158.

victed on the fourth count and the question arose whether the pawnbroker's ticket was the subject of larceny. The Court for Crown Cases Reserved, in affirming the conviction, held that "the pawnbroker's ticket may well be held to be a 'warrant for the delivery of goods' within the meaning of 7 & 8 Geo. 4, c. 29 S. 5."⁵³ The court was willing, however, to suppose that it was wrong in the interpretation of the statute and advanced the opinion "that the conviction was right as for stealing a pawnbroker's ticket or piece of paper."⁵⁴ The argument advanced by Crompton, J., was that the common law rule extended only to (1) documents of title to real property and (2) choses in action. His notion of a chose in action did not include an agreement which represented a specific personal chattel "to the property and right of possession of which the party has a right to treat himself as entitled - - - -."⁵⁵ The conclusion was, therefore, that aside from statute a pawnbroker's ticket was the subject of larceny as such or as a piece of paper. Furthermore, the court in effect rejected the view that a piece of paper ceases to be the subject of larceny merely because there appears upon it a completed instrument or document. It is also interesting to observe that the statute though couched in broad terms was

53. "V. And be it enacted, That if any Person shall steal any Tally, Order or other Security whatsoever, entitling or evidencing the Title of any Person or Body Corporate to any Share or Interest in any Public Stock or Fund, whether of this Kingdom, or of *Great Britain* or of *Ireland*, or of any foreign State, or in any Fund of any Body Corporate, Company, or Society, or to any Deposit in any Savings Bank, or shall steal any Debenture, Deed, Bond, Bill, Note, Warrant, Order, or other Security whatsoever for Money or for Payment of Money, whether of this Kingdom, or of any Foreign State, or shall steal any Warrant or Order for the Delivery or Transfer of any Goods or valuable Thing, every such Offender shall be deemed guilty of Felony, of the same Nature, and in the same Degree, and punishable in the same Manner as if he had stolen any Chattel of like Value with the Share, Interest, or Deposit to which the Security so stolen may relate, or with the Money due on the Security so stolen or secured thereby and remaining unsatisfied, or with the Value of the Goods or other valuable Thing mentioned in the Warrant or Order; and each of the several Documents hereinbefore enumerated shall throughout this Act be deemed for every purpose to be included under and denoted by the Words 'valuable Security'."

54. *Regina v. Morrison* (1859) Bell's C. C. 158, l. c. 164.

55. *Regina v. Morrison* (1859) Bell's C. C. 158, l. c. 165.

not construed as conclusive of the whole field of larceny but as supplemental to established common law conceptions. Anything that may be stolen before the statute remains so unless clearly eliminated. At least such seems to have been the point of view of the English court.⁵⁶

It seems reasonably certain from the above decisions that the English courts have never considered the absurd and indefensible rule relating to choses in action as applying to all written instruments. Indeed, *Regina v. Morrison*, *supra*, refuses to apply the rule to an instrument that was evidence of an obligation between parties. Is it not curious that an English court in the middle of the nineteenth century is found to be restricting its doctrine while an American court in the twentieth century is attempting to extend a transplanted and anachronistic notion that rests on a fiction which is socially inexpedient?

PUBLIC DOCUMENTS

Another point of attack by defendant in the case under review was that the referendum petitions were "public instruments and not the subject of private or personal ownership" and that "they were public documents, all the functions and uses of which were public and had no private or personal functions or uses."⁵⁷ At the same time defendant was careful to avoid the assertion that the petitions were public records because of the danger of Section 4543 R. S. Mo. 1909. It was argued that it was not necessary to file the petitions but that they became complete as soon as they were signed.⁵⁸ The next step is not alto-

56. "We think, therefore, that we should be extending the rule further than we are warranted by any authority in doing, if we were to hold that it extended further than to cases where the document concerns *choses in action* merely, and is only an agreement to deliver personal property, not the party's own; - - - - -" *Regina v. Morrison* (1859) Bell's C. C. 158, l. c. 166.

57. Brief for defendant, p. 9.

58. Brief for defendant, p. 73:

"The State, while conceding referendum petitions were taken, says the petitions are not completed instruments until filed and are not public documents until filed. This contention, of course, is untenable in law or reason. If, to make them completed instruments or public documents, it were necessary to file the same, still, the charge as laid in the indictment

gether clear but apparently it was expected that if a written instrument was also a public instrument or document it was (so to speak) a written instrument raised to the nth degree and, therefore, more certainly a thing unprotected by criminal law.

An opinion is ventured that the position is unsound on principle. How is it possible for a written instrument to be a "public document" which has never been filed in a public office nor come into the possession of a public officer? Suppose the indictment had alleged that the petitions had been filed with and were property of the Board of Election Commissioners.⁵⁹ Would the charge have been sustained by testimony that they were completely signed and in the possession of one Edward H. Heilman who expected to file them the next day? If the answer be in the negative then it is obvious that the allegation made was the only one the facts were capable of. Neither Heilman nor "the committee of the petitioners" was under any *legal* duty to file the petitions the next morning. In short, the petitions were no

carries the filing with it; having charged the taking of referendum petitions, this, as stated before, would carry with it every essential element to make the same completed referendum petitions, instruments or public documents. There is no negative charge that any essential element or act is wanting to make them either completed instruments or public documents.

"Referendum petitions, however, are completed the moment they are signed by the voters, and that act makes them public documents and nothing further is necessary. The mere filing adds nothing to the completeness of the instrument, and being complete, it is necessarily a public document, because the Constitution and the Charter of the City of St. Louis make it such, and, furthermore, all its uses and functions are public."

59. "Sec. 4. Signatures, uniform papers, committee of petitioners, affidavits, filing, names and addresses.—The signatures need not all be appended to one paper, but all papers comprising any original or supplemental petition under this article shall be uniform in character and shall each set forth the ordinance in full and contain the request mentioned in section 2, and designate by names and addresses five persons as the committee of the petitioners, and each such paper shall be verified by an affidavit stating the number of signatures thereto and that each signature was made in affiant's presence by, as affiant verily believes, the person whose name it purports to be; and all papers comprising an original or supplemental petition shall be assembled by the petitioners and filed with the board of election commissioners as one instrument. Each signer shall state opposite his signature his residence address. Any person shall be deemed a registered voter within the meaning of this article whose name is uneraser on the registration books." Charter of the City of St. Louis, Art. VII., Sec. 4, Rev. Code, St. Louis, 1914.

more public documents until filed than a deed is a deed before delivery or a promissory note is such until the last legally necessary act is done.⁶⁰

What does it matter if the petitions were public documents or instruments? The English courts, at least, seem never to have thought that a public document was not subject matter of larceny. The only question that would seem to arise concerns the question in whom the property⁶¹ will be laid.

Francis Walker stole "in the Inner Temple, one roll of parchment, being records of the Court of Common Pleas at Westminster, and containing remembrances and rolls of the said court, and dockets of causes entered of record in the said court." Various counts were used to allege the property to be in various persons from "our lord the King" to "Thomas Sherwin." The prisoner was found guilty at Old Bailey but the "learned Recorder entertained very strong doubts, whether an actual existing record of the courts at Westminster could properly be described as mere parchment, so as to change its actual use and nature, and reduce it to mere personal chattels" and played for the opinion of the judges. In due time the judges met and held "that as the records did not concern the realty, as was the case in *Rex v. Westbeer*, stealing the parchment was larceny."⁶²

Counsel for defendant in the case under review attempted to avoid the force of this decision by stating in their brief⁶³ that the prosecution was under the statute of 7 & 8 Geo. 4., c. 29, sec. 21. The only apparent authority for that statement is the fact that the reporter by way of annotation copied the section

60. *Rex v. Phipoe* (1795) 2 Leach's C. C. 673 (compelling one by duress of threats to life to sign a promissory note in perfect form does not constitute property which may be subject matter of robbery; paper and ink the property of prisoner and perhaps within her possession at all times). See also *Rex v. Hart* (1833) 6 Car. & P. 106.

61. Larceny is, of course, a violation of a person's possession and not his property but unfortunately the standard form of indictment uses the term "property." See a scholarly dissertation in an excellent but largely unknown treatise: Pollock and Wright, "Possession in The Common Law."

62. *Rex v. Walker* (1827) 1 Moody's C. C. 155.

63. Brief for defendant, p. 37-38.

in the margin. Nowhere in the opinion is reference made to the statute. Furthermore, the statute was not enacted until June 21, 1827, and it was therein provided: "That this Act shall commence on the first day of July in the present year." The opinion⁶⁴ at the outset states that the prisoner was tried "in the year 1826, for grand larceny." The decision of the Court for Crown Cases Reserved was delivered in "Hilary⁶⁵ Term, 1827." Therefore, the final opinion was delivered several months before the passage of the statute. Moreover, it would seem safe to assume that grand larceny was a felony in England at that day. The statute denounced acts which were made misdemeanors.⁶⁶

The Colonial Minister received two dispatches from the Lord High Commissioner of the Islands and had copies printed for private distribution. Twenty-eight copies were delivered to the sub-librarian at the Colonial office. The prisoner took a copy and was indicted for "stealing ten pieces of paper, value one penny, the property of our Sovereign Lady the Queen." Martin, B., instructed the jury that the only question it had to solve was whether defendant "*intended to deprive that office of all property in them and to convert them to his own use.*" The verdict was one of not guilty. It was observed by Martin, B., as follows:

"Such documents as these are clearly the subject of larceny, and inasmuch as the stealing of the paper itself would have been a felony the fact of the paper being printed on makes no difference, and indeed this fact might in a great many instances materially increase the value."⁶⁷

(To be continued)

64. *Rex v. Walker* (1827) 1 Moody's C. C. 155.

65. "A term of court, beginning on the 11th and ending on the 31st of January in each year." Black's Law Dictionary, p. 572.

66. It is stated in the brief for defendant, p. 38, with reference to this decision that "it is clear that the judges decided nothing except that he was guilty under the statute and by virtue of its terms." It is submitted that the error in this statement has been demonstrated.

67. *Regina v. Guernsey* (1858) 1 F. & F. 394.

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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—Mr. Justice Holmes, *Collected Legal Essays*, p. 269.

NOTES ON RECENT MISSOURI CASES

PRACTICE—DECLARATION OF LAW—DEMURRER TO EVIDENCE. *A. Jaicks Co. v. Schoellkopf et al.*¹ In an action on six tax bills against certain city lots owned by defendants, the defense was that the paving for which the tax bills were issued was not done in compliance with the specifications of the paving contract. At the close of conflicting testimony as to the quality of the work plaintiff asked for the following declaration of law: "The court, *sitting as a jury*, declares the law to be that, under the pleadings and testimony in this case the judgment must be for the plaintiff" etc. (*Italics supplied.*) The declaration was given, defendant excepting.

The expression, "*sitting as a jury*," as italicized above is useless and possibly harmful. The court as a jury does not declare the law. The

1. (1920) 220 S. W. 486.

court as a court declares the law to the court as a jury. It is unfortunate that the word "court" is used in two different senses. Perhaps it would be better to say that the court, i.e., the judge, declares the law to himself as a jury. If the person who drew the instruction had the opinion that the court in declaring the law acts in any different capacity in the event that there is a jury of one, viz, the trial judge, as distinguished from a jury of twelve, then he had a fundamental misconception. In any event it will avoid confusion if the expression "sitting as a jury" is omitted even in the event of the trial judge occupying a dual rôle.

Upon appeal the Supreme Court in an opinion by Bond, J., held that the declaration of law was erroneous because it excluded from the court sitting as a jury any consideration of the conflict in the evidence. On a motion for rehearing,² an opinion *per curiam* was rendered holding that the declaration was erroneously given, also that the opinion of Bond, J., was erroneous; that the declaration of law did not exclude consideration of the conflict in the testimony, but that the trial court had passed on the evidence of the defendant and erred in deciding that it was totally insufficient to sustain the defense.

The *per curiam* opinion further says, "the instruction given for the plaintiff is in effect a peremptory instruction, and in effect was a demurrer to the evidence offered by the defendant." Again, "In other words, it was a demurrer to the evidence." Such use of legal terminology does not aid in clarifying but serves to confuse.

It was at one time held in Missouri³ that a declaration of law, (by the court before whom the case was tried without a jury) "that on the pleading and evidence the plaintiff is entitled to recover" means merely that the court finds for the plaintiff. But in *Patterson v. K. C. F. S. and M. R. Co.*,⁴ where there was a trial before the court, without a jury, it was held in a case where there was a contested issue of fact that a finding for the plaintiff was erroneous upon a declaration of law that upon the pleadings and evidence plaintiff is entitled to recover. It is now understood that a declaration of law, where there is a trial before the court, is for the purpose of showing the appellate court upon what theory of law the trial court has proceeded.⁵

Viewed in this light it is apparent that the declaration of law in the principal case was erroneously given because there was substantial evidence to sustain the defense and the trial court by its declaration shows that it acted upon the hypothesis that there was not substan-

2. (1920) 220 S. W. 486.

3. *Hess v. Clark* (1882) 11 Mo. App. 492.

4. (1892) 47 Mo. App. 570.

5. *Butts v. Gunby and West* (1909) 135 Mo. App. 28, 115 S. W. 493; *Helmuth v. Benoist* (1910) 144 Mo. App.

695, 129 S. W. 257; *Hall v. Smith* (1910) 149 Mo. App. 379, 130 S. W. 449; *Zahn v. Royal Fraternal Union of St. Louis* (1910) 154 Mo. App. 70, 133 S. W. 374; *Schoen & Co. v. Hagunin* (1911) 156 Mo. App. 68, 135 S. W. 967.

tial evidence to sustain the defense. That error was all that was needed to justify a reversal of the judgment and to say that the declaration of law has the effect of a demurrer to the evidence or is a demurrer to the evidence adds no light on the subject.

The Missouri Code of Civil Procedure⁶ contains no provision for a demurrer to the evidence. While the common law demurrer to the evidence is not expressly abolished, the status of that demurrer following the decisions of *Gibson v. Hunter*⁷ and *Fowle v. Common Council of Alexandria*⁸ leaves little room for doubt that the references in the Missouri cases to a demurrer to the evidence do not mean the common law demurrer to evidence. What is usually meant by this expression is a motion for a directed verdict, and it is submitted that it is desirable to call this motion by its proper name.

On the whole, it seems that the *per curiam* opinion was not clarifying. Bond, J., used unfortunate language in saying that "the court, in effect, excluded from its view any consideration of the conflict in the evidence." He reached the correct result, however.

R. E. M.

PRACTICE—PRIVILEGE OF NON-RESIDENT WITNESS. *Bledsoe v. Letson*.¹ The St. Louis Court of Appeals in the above case laid down the rule that a non-resident witness attending court in Missouri was not privileged from service of civil process. The facts in the case are: A, a resident of Illinois, was attending court in Missouri for the purpose of testifying in a civil suit, and while so doing was served with a summons in an action of deceit brought by B.

At common law suitors, witnesses and other persons interested in a suit were privileged from arrest during their actual attendance at court, including their coming and going.² A *capias* could then be secured on almost any kind of complaint and most cases were started in that way.³ The rule had its origin in an effort to protect the courts in the orderly administration of justice. It was the arrest that interfered with the court⁴ and the privilege in many instances, tho not in all, was limited to freedom from arrest.⁵ The service was not always set aside but the defendant was released upon giving common bail which was equivalent to an entry of appearance in the suit.⁶ The non-resident

6. R. S. Mo. 1909, Chap. 21, Art. V. Pleadings.

7. (1793) 2 H. Blackstone, 187. (H. of L.)

8. (1826) 11 Wheaton 320. (U. S. Sup. Ct.)

1. (1919) 215 S. W. 513.

2. Tidd, Practice, 3d. Am. Ed. p. 195; 3 Blackstone, Lewis Ed., 289.

3. 3 Blackstone, Lewis Ed., p. 282.

4. *Cole v. Hawkins* (1738) 2 Stra. 1094.

5. *Pool v. Gould* (1856) 1 H. & N. 99.

6. Black's Law Dictionary—Title-Common Bail; Long's Case (1658) 2 Mod. 181.

witness, however, was not only privileged from arrest but also from service of process.^{6a} The reason for the rule was to promote justice by encouraging the foreign witness to come into England and give his testimony. For as Lord Mansfield said: "The service of the subpoena abroad would be an useless form; he cannot be punished for not coming; if he comes at all, then it must be voluntarily."

The doctrine of privilege was early adopted in the United States and liberally extended to freedom from service of civil process. The development of the American rule has been along a different line than at English common law, because in many instances the distinction made in the English cases between freedom from arrest and service of process was overlooked. The privilege at common law was that of the court and the claim of the party was of minor importance. But in the United States it was recognized that many of the parties would not come to the forum as the individual regarded it desirable that he be sued in his own jurisdiction. The privilege is invoked to protect this policy as well as to aid the court in the administration of justice.⁷ That it is a personal as well as a judicial privilege is evident from the decisions holding that the persons protected may waive the privilege.⁸

That a witness is immune from service while attending trial in a state other than that of his residence is almost universally recognized by the American courts.⁹ There is a conflict of authority as to whether a non-resident suitor is entitled to a like exemption. Some courts while allowing it to a non-resident witness deny it to a suitor,¹⁰ but the great weight of authority declares both parties and witnesses are alike entitled to the privilege,¹¹ tho it is obvious much can be said against extending the privilege to the case of the non-resident suitor.

The rule laid down in the principal case is directly opposed to the great weight of authority, American and English. The court in its opinion made no attempt to justify its decision upon reason or the weight of authority, but relied solely upon previous decisions of the Missouri Supreme Court. This was all that was said on the question: "Taking up the question of the overruling of the defendants' plea in abatement, we are satisfied that the plea was properly overruled. See *Baisley v. Baisley*, 113 Mo. 544, 21 S. W. 29, 35 Am. St. Rep. 726; *Christian v. Wil-*

6a. *Walpole v. Alexander* (1782) 3 Douglas 45.

7. *Halsey v. Stewart* (1817) 4 N. J. L. 420; *Jacobson v. Hosmer* (1889) 76 Mich. 234, 42 N. W. 1110.

8. *Sheehan & Loler Trans. Co. v. Sims* (1889) 36 Mo. App. 224.

9. *Kawffman v. Kennedy* (1885) 25 Federal 785; *Sherman v. Gundlach* (1887) 37 Minn. 118, 33 N. W. 549; *Chittenden v. Carter* (1909) 82 Conn. 585, 74 Atl. 884.

10. *Baldwin v. Emerson* (1888) 16 R. I. 304, 27 Am. St. Rep. 741; *Gwynn v. McDanel* (1895) 4 Idaho 605, 43 Pac. 74.

11. *Andrew v. Lembeck* (1888) 46 Ohio St. 38, 18 N. E. 483; *Hale v. Wharton* (1896) 73 Federal 739; *Juneson Bank v. McSpadden* 5 Biss. 64, Federal Cases No. 7,582; *Breon v. Miller Lbr. Co.* (1909) 83 S. C. 221, 65 S. E. 214; *Diamond v. Earle* (1914) 217 Mass. 499, 105 N. E. 363.

liams, 111 Mo. 429, 20 S. W. 96; *State ex rel v. Moore*, 164 Mo. App. 649, 147 S. W. 551." (Becker, J.)

The first case relied upon is *Christian v. Williams*¹² which is authority only for the proposition that a *resident* defendant and witness attending court in a county in Missouri other than that of his own residence is not privileged. The next case, *Baisley v. Baisley*,¹³ holds that a non-resident who has brought suit in this state against another non-resident is subject to service of civil process in a suit brought by the person whom he has sued.

The actual decisions were not very sweeping, but owing to the fact that they are based upon a Missouri statute¹⁴ they are capable of being construed so as to entirely abolish privilege. *Christian v. Williams* was brought under the first section of the statute and the court based its ruling upon the words "was found." The statute was interpreted to mean that the only requirement for getting service on a non-resident was to find him in the county. *Baisley v. Baisley* was brought under the fourth section of the statute which does not contain the words "was found." Nevertheless, the decision was in part placed upon that ground. Sherwood, J., evidently realized that the reading of the words "was found" into the fourth section was more or less arbitrary for he gave the additional reason that the defendant had voluntarily brought suit in the state and cited the case of *Bishop v. Vose*,¹⁵ a leading American case, holding that such a party was not privileged. The decision can be justified upon the latter basis. The defendant had voluntarily come into the state asking the aid of its judicial machinery in enforcing his claim and there would be no injustice in compelling him to assume the burdens,¹⁶ and have causes against him tried by the same court.

The full effect of placing the decisions solely upon the statute is seen in the position taken by the Court of Appeals in *State ex rel v. Moore*.¹⁷ That case proceeds upon the theory that the effect of the statute is to abolish all privilege in that it makes no exceptions. This is carrying the doctrine further than Sherwood, J., thought it could be carried. In *Christian v. Williams*, after holding the defendant was not privileged, he said: "Of course these remarks do not apply to a case where a party is induced by fraud or compelled by criminal process to enter within the boundaries of a county other than that of his residence." If *State ex rel v. Moore* is followed to its logical conclusion the *dicta* in *Christian v. Williams* could not be law. The *dicta* is well supported by authority.¹⁸ This is a clear exception to the statute and

12. (1892) 111 Mo. 429, 20 S. W. 96.

13. (1893) 113 Mo. 544, 21 S. W. 29.

14. Sec. 1. R. S. Mo. 1889, now Sec. 1751 R. S. Mo. 1909.

15. (1858) 27 Conn. 1.

16. *Gwynn v. McDanel* (1895) 4 Id.

aho 605, 43 Pac. 74.

17. (1912) 164 Mo. App. 649, 147 S. W. 551.

18. *Marsh v. Bast* (1867) 41 Mo. 493; *Capitol City Bank v. Knox* (1871) 47 Mo. 333.

the basis of the decision in *State ex rel. v. Moore*, i. e., there are no exceptions to the statute, is in direct conflict with the privilege extended to parties who are compelled by abuse of criminal process or induced by fraud to come into a foreign jurisdiction.

Christian v. Williams and *Baisley v. Baisley*, it is suggested, do not present a sound application of the statute. In the Revised Statutes of Missouri for 1879 the statute first appears in its present form and it is headed:¹⁹ "Of the Place for Bringing Suits." What the Legislature intended to accomplish in revising and amending the statute was to provide a *forum* for bringing suits. The "place where" the suit could be instituted was pointed out but it was not intended to affect the other rights of the parties. In its interpretation the Supreme Court isolated the statute and lost sight of the principle that a statute should be construed with reference to coordinate rules and statutes. The most reasonable construction to place upon the statute is that it was intended to run parallel with and not in derogation to any common law principle. The Supreme Court of Indiana in holding that a statute similar to the one in Missouri did not destroy privilege said:²⁰ "If we should find a well established principle of law exempting non-residents who are in this state for the purpose of attending court as parties or witnesses, we should be bound to construe the statute with reference to that principle, for we could not hold that the Legislature meant to disregard it and establish a new rule."²¹

The Missouri Supreme Court has never directly passed upon the privilege of a non-resident witness, but if the principles enunciated in previous decisions are rigorously applied without regard for common law principles,²² it will be held that he is not privileged. There is a sound reason for making an exception to the operation of the statute in the case of a non-resident witness. It should not be overlooked that the defendant in *Christian v. Williams*, even if wanted only as a witness, could have been compelled to appear and give his testimony.²³ The defendant in the principal case could only be invited.²⁴ Whether or not a non-resident witness gives his testimony is often a matter of accommodation. Public policy would seem to demand that his privilege of being sued in his own jurisdiction should not be forfeited because he goes into a foreign jurisdiction to give testimony in a case to which he is not a party. A citizen of this State who is asserting or defending his rights should be enabled to procure the attendance of all such per-

19. R. S. Mo. 1879, Sec. 3481.

20. *Wilson v. Donaldson* (1888) 117 Ind. 35, 20 N. E. 250.

21. For a discussion of the interpretation placed on the statutes see: Alderson on Judicial Writs, Sec. 120; *Hale v. Wharton* (1896) 73 Fed. 739, citing but not following *Baisley v. Baisley* and

Christian v. Williams.

22. *Baisley v. Baisley*, *supra*; *Christian v. Williams*, *supra*.

23. R. S. Mo., 1909, Sec. 1764, R. S. Mo., 1889, Sec. 2021.

24. *Works, Courts and Their Jurisdiction*, Sec. 37.

sons as are necessary to support or defend his rights without molestation of the witnesses.²⁵ He has no way of compelling a non-resident witness to appear in court and give his testimony and such a witness, if he is willing, should be allowed to approach the court free from fear of hindrance or subjecting himself to service of civil process. Otherwise he may not come at all.

It is submitted that an extension of the principle of *Christian v. Williams* and *Baisley v. Baisley* as made in the case reviewed is not desirable, but upon the contrary, upon reason and sound public policy the doctrine of those two cases should be restricted to the exact facts in issue in those cases.

I. C. N.

TRUSTS—CHARITABLE PURPOSE—DESIGNATION OF TRUSTEE. *Robinson v. Crutcher*.¹ This was an action by the heirs of Temple B. Robinson to have the fifth, sixth and seventh clauses of Robinson's will construed.² The trial court held that valid charitable trusts were created. This finding was reversed by the Supreme Court *en banc*³ on the ground that there was no separation of the legal and equitable estates; that there was no bequest to "any natural or artificial entity;" but that the testator merely attempted to bequeath a certain part of his estate to the "capital" of certain public school funds.⁴

Apparently there is an error in the opinion of the majority of the Supreme Court in failing to give proper weight to that part of the seventh clause which directed his "executors to pay over to the *lawful custodians of the several public school funds* mentioned in this and the two preceding clauses of this will the several shares given to the said school funds as aforesaid." (Italics supplied) Concededly, the language of this provision is not artistic; that, however, is not a requirement with

25. *Halsey v. Stewart* (1817) 4 N. J. L. 420.

1. (1919) 277 Mo. 1, 209 S. W. 104.

2. The material portions of the will follow:

"4th: The residue of my property of whatsoever kind and wheresoever situate, I will and direct shall be divided into three equal parts.

"5th: One of such third parts I give and bequeath to the capital of the township school fund of T. 34, R. 10, in Monroe county, Missouri.

"6th: One of such third parts I give and bequeath to the capital of the public school fund of Monroe county.

"7th: One of such third parts I give and bequeath to the capital of the public school fund of the State of Missouri and I direct my executor to pay over to the lawful custodians of the several public school funds mentioned in

this and the two preceding clauses of this will the several shares given the said school funds as aforesaid.

3. Walker, J., writing the opinion in which, Bond, C. J., Faris, and Graves, JJ., concurred. Williams, J., wrote a dissenting opinion in which Blair, J., concurred.

4. The following statement in the majority opinion seems not clear:

"Neither directly or by reasonable implication is a donee designated who can take the legal title to the funds bequeathed and thus authorize the appointment of a trustee." If a donee had been designated and he had become vested with the legal title, what occasion would there be for the appointment of a trustee? If there were a trust the donee himself would be the trustee.

wills. It is of course true that all the provisions in a will relating to a particular subject should be considered together and the intent of the testator ascertained without regard to crudities in expression.⁵ If, then, the several clauses are read by a sympathetic eye, is it not plain that the testator meant to vest the *legal title* of the property bequeathed in the *lawful custodians* of the three separate school funds? There seems to be no dispute that the three school funds really existed and that actual human beings had custody of them at the time of the testator's death. It is equally true that the beneficiaries of the trust (even tho they were not expressly mentioned) are persons who would be benefited by the administration of the capital of the several school funds. And this is the point of view of Williams, J., in his dissenting opinion.

The answer of the majority of the court to the above reasoning is simply the statement that "it was the purpose of the donor to bequeath these shares of his estate to the *school funds themselves*, and not to the legal custodians of funds of like character." Was not the court unduly critical in deciding that the testator had an absurd and impossible intention? This decision and the one in *Jones v. Patterson*⁶ indicate that the Supreme Court of Missouri does not look with great interest and liberality upon charitable trusts. This strict view has been regretted.⁷

If it is conceded that the majority opinion is correct in its conclusion that the bequests to the capital of the school funds are a nullity there still remains another angle of approach. There would seem to be no doubt that it was the *intention* of the testator to create a charitable trust for educational purposes.⁸ The result would be, then, that there has been the creation of a trust except that a trustee has not been named.⁹ Surely, it is too late to deny, and the majority opinion *appar-*

5. R. S. Mo., 1909, Section 583: "All courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them."

6. (1917) 271 Mo. 1, 195 S. W. 1004; 20 Law Series 53.

7. "Melancholy the spectacle must always be, when covetous relatives seek to convert to their own use the fortune which a testator has plainly devoted to a great public benefaction." James Barr Ames, *The Failure of the "Tilden Trust,"* 5 Harv. L. Rev. 389, Ames Lect. Leg. Hist. 285.

"In *Robinson v. Crutcher*, bequests 'to the capital of' certain township, county and state school funds were held to fail because no trustees were named, although the testator directed his executor to pay over the bequests 'to the lawful custodians of the several public school funds mentioned.' The court was of the opinion that direct gifts to

the funds were intended, which failed because a fund could not be a legatee; that there was no attempt to create a trust, and that the court therefore could not designate a trustee. On this reasoning a gift to the Harvard Endowment Fund instead of to the trustees of the fund would fail. *The technicality of this decision can only be equaled by the decisions in New York that a direct gift to an unincorporated charitable association cannot be upheld as a charitable trust.*" (Italics supplied.) Austin W. Scott, 33 Harv. Law Rev. 695. Compare 19 Harv. Law Rev. 202.

8. The majority opinion in conceding the "utmost" stated that, "it was the purpose of the donor to add money to money for the benefit of education." 277 Mo. 1. c. 9, 209 S. W. 1. c. 106.

9. It is true that the majority opinion makes the following declaration:

"The question here involved is not, as contended by respondent, the failure to name a trustee" etc. 277 Mo. 1. c. 10, 209 S. W. 1. c. 107.

ently concedes¹⁰ that a charitable gift will not fail because of a failure to designate a trustee. *Schmidt v. Hess*,¹¹ an earlier Missouri decision, states the correct doctrine. There one R executed and delivered a deed in which the "Lutheran Church" was named as the grantee. There was no entity by that name. The plaintiffs as trustees of the Evangelical Lutheran Trinity Church brought a bill to vest title in the land in themselves and to restrain the defendants as trustees of the German Evangelical Central Congregation and others from interfering with their use of it. Said the court: "No doubt is entertained that the gift under consideration is a charity and falls within the meaning of the rules of chancery. (2 Sto. Eq. Jur., §1164, and cases cited.) And although in consequence of the non-incorporation of the church for whose benefit the grant was made, there was no one *in esse*, at the time of making the donation, capable of being the recipient of the trust; yet the use being a charitable one, a court of equity having ascertained the intent of the grantor, will not allow the grant on that account to fail, but will see to its effectuation." Accordingly, there was judgment for a decree vesting title in the property in the plaintiffs, as trustees of the Evangelical Lutheran Trinity Church.¹² This precedent furnished a correct solution of the principal case.

Shortly before the decision in the principal case, *While v. Mayor and Common Council of City of Newark*¹³ was decided by the Court of Chancery of New Jersey. The facts in the latter case were even stronger against the valid creation of a charitable trust than they were in the Missouri case.¹⁴ A contrary result was reached in New Jersey. In view of the fact that the opinion of the New Jersey Court is very clear it is wondered whether it was called to the attention of and considered by the Missouri court. The New Jersey court stated: "It is to be noted that the gift is *directly to the fresh air fund and not to a trustee*. As far as appears there is in Newark neither an incorporated nor an unincorporated body called the fresh air fund, and the evidence fails to show the existence of any permanent fund of that description." (Italics supplied.)

Nevertheless, the court held that the gift was to a charity and that

10. "If such a trust has been created it will not be permitted to fail because a trustee has been erroneously or uncertainly designated, but the court in the exercise of its inherent equity jurisdiction will appoint one." 277 Mo. 1.c. 9, 209 S. W. 1.c. 105. If the court meant that there could be no "trust" unless there was a trustee provided for in some indefinite manner then the statement seems too restricted. The authorities are collected in 14 L. R. A. (N.S.) 109.

11. (1875) 60 Mo. 591.

12. Compare *Lilly et al. v. Tobbein et al.* (1890) 103 Mo. 477, 486, 15 S. W. 618 (*dictum*); *Schneider v. Kloepple* (1917) 270 Mo. 389; 193 S. W. 834.

13. (1918) 89 N. J. Eq. 5, 103 Atl. 1042.

14. The will under consideration in the New Jersey case provided as follows: "I give the interest of five thousand dollars to the *fresh air fund* of Newark to be used every summer for special needy cases that need to be sent right away not to go in the general fund, * * * the money I give to the

since the bequest was for a specific object, the court would nominate a trustee to administer the trust.

Nine years previous to the decision under review the Supreme Court of Iowa¹⁵ passed upon the same proposition in point of principle.¹⁶ The conclusion of the Iowa court also was just the reverse of the Missouri court. Apparently the decision was not cited by counsel and no mention of it is made by the Missouri Supreme Court. It was argued in the Iowa case that the bequest was invalid because "there is no such fund, and that the gift is not to any person, corporation, individual or thing capable of accepting it, and is therefore void for uncertainty." The court conceded "that the statute has not created a fund specifically designated as a 'county permanent school fund' " and made this obvious reply:¹⁷

"So also, tho no donee or trustee be named, or if one be named who is incapable of taking and holding the gift for charitable uses, the trust will not be allowed to fail, as a court of equity will supply the proper trustee." ¹⁸

It is only necessary to contrast with the New Jersey and Iowa decisions one statement in the majority opinion of the Missouri case to understand the cause of the decision believed to be an unfortunate one. Says the Missouri court: "Hence, it would become necessary to sustain the same, to write into the will, otherwise clear and unambiguous, the names of the donees who would take legal title to the funds bequeathed." ¹⁹

Yes, may be replied, this is necessary but it may be done, and should be done, and has been done time and again by the chancellor exercising equity jurisdiction. In every case where there is a failure to name a trustee the court will have to appoint some one who will become invested with the legal title.

The final conclusion seems to be that whichever point of view is

fresh air fund of Newark, N. J. to be put out at interest if not already invested." (Italics supplied.)

15. *Chapman et al. v. Newell* (1910) 146 Ia. 415, 125 N. W. 324.

16. The eighth or residuary clause of the will provided: "All the rest and remainder of my estate including the proceeds of the land sold, and after the payment of the legacies above named I give, devise and bequeath absolutely and without reservation to the permanent school fund of Louisa county, Iowa."

17. *Chapman v. Newell* (1910) 146 Ia. 1.c. 422, 125 N. W. 1.c. 327.

18. The liberal point of view of the Iowa court is shown by the following: "This devise does not attempt to treat the 'permanent school fund' as being in itself a person or corporation capable of

receiving and enjoying the gift, but it is as if the testator had said, 'I devise and bequeath the remainder of my estate to increase the permanent school fund of Louisa county,' or 'I give and bequeath to Louisa county for a permanent school fund.' If, for instance, the will had contained a devise 'to the Schoolhouse Fund of the Independent School District of Wapello in Louisa County,' there would not be the slightest hesitation on the part of any lawyer in saying that this was a good devise to the independent district for the use or upon the trust therein expressed." Compare the provisions under consideration in the Missouri case, note 2, *supra*.

19. *Robinson v. Crutcher* (1919) 277 Mo. 1.c. 9, 209 S. W. 1.c. 106.

taken, the majority opinion is incorrect; and it is to be hoped that in the course of time the minority opinion will prevail.

A. N. BROWN.²⁰

CERTIORARI FROM THE SUPREME COURT TO THE COURT OF APPEALS—SCOPE OF THE INQUIRY. *State ex rel. Kansas City v. Ellison*.¹ The Supreme Court of Missouri issued a writ of certiorari to the Kansas City Court of Appeals on relator's contention that the latter court had failed to follow the latest previous ruling of the Supreme Court in *Barnett v. Kansas City*.² The Constitution of Missouri, Section 15, Article 6, has been interpreted to give authority to the Supreme Court to quash a decision of the Court of Appeals if it conflicts with the latest previous ruling of the Supreme Court. In considering whether the decision in the *Barnett* case conflicted with the rulings of the Supreme Court, a question arose as to certain instructions given by the trial court for the plaintiff. These instructions were not set out in their entirety in the opinion of the Court of Appeals, but were only referred to therein. The question arose as to whether the scope of inquiry of the Supreme Court on certiorari extended to these instructions in their original form. In deciding this point the court laid down the general rule that on certiorari from the Supreme Court to the Court of Appeals, any written document referred to in the opinion of the Court of Appeals thereby becomes as much a part of the record for review as if it were set out in the opinion *in haec verba*. This doctrine of incorporation into the record for review of written documents referred to in the Courts of Appeals' opinions is a comparatively new ruling yet it seems to have been established by the decisions during the last few years. *State ex rel. National Newspapers' Association v. Ellison*³ held that the original petition as presented to the trial court, when referred to in the opinion of a court of appeals, may be brought up and reviewed along with the opinion. Also, *State ex rel. Heine Safety Boiler Co. v. Robertson*⁴ says that a previous opinion of the Court of Appeals in the same cause is incorporated into the record by reference thereto in the opinion under consideration and may be considered. *State ex rel. Central Coal & Coke Co. v. Ellison*⁵ for the purpose of ascertaining the facts held that two previous opinions of the Court of Appeals referred to in the opinion under consideration might be considered. To the same effect is *State ex rel. Quercus Lumber Co. v. Robertson*.⁶ *State ex rel. Hayes et al. v. Ellison*⁷ held an order of publication to be incorporated by reference

20. Senior, School of Law, University of Missouri.

1. (1920) 220 S. W. 498.

2. (1919) 214 S. W. 240.

3. (1915) 176 S. W. 11.

4. (1916) 188 S. W. 101.

5. (1917) 270 Mo. 645, 195 S. W. 722.

6. (1917) 197 S. W. 79.

7. (1916) 191 S. W. 49.

thereto in the opinion of the Court of Appeals, and the original order was thereby brought up for review. *State ex rel. Curtis v. Broadus*⁸ was decided prior to those cases just cited. It laid down the rule that the entire abstract of the record as filed in the Court of Appeals may be brought up and examined on certiorari. The case is silent on the doctrine of incorporation and the rule seems to be too broad, because later cases hold that the bill of exceptions is not to be reviewed on certiorari by the Supreme Court to a Court of Appeals. On the other hand *State ex rel. Wahl v. Reynolds*,⁹ goes so far as to state in the opinion that the scope of inquiry should be limited to the present opinion of the Court of Appeals that is under review, but the case is not a direct holding on that point and the dictum is not being followed. Neither does that case say anything about the doctrine of incorporation by reference. *State ex rel. C. R. I. & P. Ry. Co. v. Ellison*¹⁰ held that the Supreme Court in determining on certiorari whether there is a conflict between the decision of the Court of Appeals and the last previous ruling of the Supreme Court will not look behind the recital in the opinion of the Appellate Court for a statement of the facts or evidence. *State ex rel. Dunham v. Ellison*¹¹ states that on certiorari to the Court of Appeals the Supreme Court will not examine the bill of exceptions for the purpose of ascertaining the facts because a case brought up for review by certiorari is not to be reviewed as if it were an appeal, but reviewed only for the purpose of determining conflict of decision. The last two cases represent the law regarding inquiry into the bill of exceptions for the purpose of ascertaining the facts and apparently stand undisputed.¹²

It is wondered, though, whether the final word has been said as to this feature of the inquiry. Frequently the most serious question in a case is whether there is any evidence to sustain the judgment below. Whether there is any evidence to sustain a complaint, though originally regarded as a question of fact for the jury in the early days of the modern jury trial, today is undoubtedly a question of law for the Judge.¹³

It is obvious then that if a court of appeals erroneously decides that there is evidence to sustain a claim against a defendant when no such evidence exists—and this can only be told by examining the bill of exceptions—then it follows that a Court of Appeals can in reality fail to follow the rule of law as announced in the last decision of the Supreme Court. For as stated, whether there is any evidence of an as-

8. (1911) 238 Mo. 189, 142 S. W. 340.

9. (1917) 272 Mo. 588, 199 S. W. 978.

10. (1915) 263 Mo. 509, 173 S. W. 690.

11. (1919) 213 S. W. 459; (1919) 213 S. W. 804.

12. (1918) 200 S. W. 1042; (1919) 257 Mo. 19, 210 S. W. 881.

13. *Slades Case* (1648) Style 138; *Bushells Case* (1670) Vaughan 135; *Chichester v. Phillips* (1680) T. Raymond 404. "Buller, Justice. 1. Whether there be any evidence is a question for the judge. Whether sufficient evidence is for the jury." *Company of Carpenters v. Hayward* (1780) 1 Doug. 374.

serted right, duty, power or liability is a question of law. A decision that there is not evidence cannot be tested unless the evidence given at the trial is examined. If it will not be examined by the Supreme Court it would seem that a finding that there is evidence or that there is not evidence, which is a question of law, may be held differently by the Supreme Court and the Courts of Appeals. Such a condition is not desirable. Harmony of actual decision was intended by the Constitution and not mere lack of obvious conflict on the face of written opinions.

Summing up these decisions it seems clear that the scope of inquiry on certiorari from the Supreme Court to a Court of Appeals extends primarily to the opinion of the Court of Appeals; but when it is necessary to look further in order to throw more light upon whether there is a real conflict of decision, the Supreme Court has adopted the doctrine of incorporation into the record for review of written documents referred to in the opinion of the Court of Appeals. The effect of this has been to extend the scope of inquiry to the pleadings in the case, orders of publication, previous opinions of the Court of Appeals in the same cause, and finally by the principal case to the instructions given to the jury by the trial court whenever reference is made to these matters in the opinion of the Court of Appeals. Clearly the scope of inquiry does not extend to the bill of exceptions or the facts or evidence other than as recited in the opinion rendered by the Court of Appeals.

This doctrine of incorporation by reference is a fiction but it seems to bring about a desired result. The justification for the fiction is that it will tend to bring about harmony of actual decision rather than mere harmony of written opinions. If the scope of inquiry were limited to the opinion of a Court of Appeals it would often be impossible to tell from a cleverly written opinion whether there was a conflict in the application of a principle of law.

It is the actual application of legal principles that determines whether justice or injustice has been done in any particular controversy.¹⁴

JOHN P. RANDOLPH¹⁵

CRIMINAL LAW—RECEIVING STOLEN GOODS—GUILTY KNOWLEDGE. *State v. Ebbeler*.¹ This was a prosecution for receiving stolen goods. The lower court instructed the jury that by the term "knowing" was meant, "Such knowledge and information in his possession - - - as would put a reasonably prudent man, exercising ordinary caution, on

14. For a general discussion see 6 Law Series 3 and 13 Law Series 30.

15. Senior, School of Law, Univer-

sity of Missouri.

1. (1920) 222 S. W. 396; annotated in 30 Yale Law Jour. 194.

his guard and would cause such a man exercising such caution, and under circumstances which you believe defendant received the property to believe and be satisfied that the property had been stolen." The Supreme Court held the instruction erroneous.

Under the various statutes in England² and in the states of this country³ making the receiving of stolen goods a felony, knowledge on the part of the accused that the goods were stolen is essential to the offence. In defining this element three positions are logically possible. All of them have been set forth in reported cases. In a few of the earlier decisions⁴ it was held that direct *personal* knowledge was necessary for conviction and this rule has been adhered to in at least one American jurisdiction.⁵ The impossibility of proving such knowledge in the vast majority of cases, however, has led to its repudiation in England.⁶ This view has not been accepted generally in the United States.

In reacting against this impractical view, some courts have laid down the rule that where the defendant receives goods under such circumstances that a man of ordinary prudence and intelligence would believe them to have been stolen, he will be deemed to have guilty knowledge without proof of actual knowledge on his part.⁷ Under this rule a conviction is possible in cases where the accused has no knowledge of any kind that the goods were originally obtained by theft or embezzlement. Mere negligence is permitted to take the place of guilty knowledge in determining criminal liability. The rule has been criticized in many American cases⁸ and it would seem contrary to the general policy of the common law to punish a negligent act unless the negligent actor displays a disregard for human life or the personal safety of another. Moreover, the words of the statute "*knowing them to have been stolen*"⁹ make it clear that the legislature intended to make knowledge the gravamen of the offence thereby requiring a specific intent to be shown. Legislatures might have created criminal responsibility for the mere receiving of stolen goods with a general criminal intent by the omission of the quoted words. In crimes of this class negligence is never allowed to take the place of a criminal intent¹⁰

2. 24-25 Vict. c. 96.

3. The provision in this state is Sec. 4554 R. S. 1909.

4. *Rex v. Densley* (1834) 6 C. & P. 399; *Regina v. Rymes* (1853) 3 C. & K. 326. The remarks in these cases, however, seem to be largely *obiter*. Perhaps the historical connection between misprision of felony and the receiving of stolen goods may account for the carrying over of this element from the former to the latter offence.

5. *Young v. Commonwealth* (1882) 4 Ky. Law R. 55, 11 Ky. Opin. 689.

6. *Regina v. White* (1859) 1 F. & F. 665; *Rex v. Dunn* (1826) 1 Moody C. C.

146.

7. *Commonwealth v. Finn* (1871) 108 Mass. 466; *State v. Feuerhaken* (1895) 96 Ia. 299, 65 N. W. 299; *State v. Druxinman* (1904) 34 Wash. 257, 75 Pac. 814; *Commonwealth v. Leonard* (1886) 140 Mass. 473, 4 N. E. 96. (*Semble*).

8. *State v. Roundtree* (1908) 80 S. C. 387, 61 S. E. 1072, 22 L. R. A. (N.S.) 833; *Robinson v. State* (1882) 84 Ind. 452; *Cohn v. People* (1902) 197 Ill. 482, 64 N. E. 306; *State v. Alpert* (1914) 88 Vt. 191, 92 Atl. 32.

9. 4554 R. S. Mo. 1909.

10. May, Criminal Law, 3rd. Ed. Sec.

unless it is clearly necessary to carry out the legislative policy involved in the statute.¹¹

In many jurisdictions a third view seems to prevail although it has not been formulated or defined with any particular clearness by the courts. According to this rule personal knowledge by the accused is part of the *corpus delicti*.¹² This knowledge need not be an exact acquaintance with the circumstances of the original theft or embezzlement of the goods.¹³ It is sufficient to prove that at the time the accused received the goods, he *believed* from the circumstances under which he got them that they had been obtained by the person giving them into his possession through embezzlement or theft.¹⁴ It would seem that if the reception of the goods under such circumstances as would place the average man on his guard is proved, the jury might, in the absence of countervailing evidence, reasonably conclude that the defendant had such a belief.¹⁵

They must be satisfied, however, that he actually did so believe, not that, measured by the norm of the hypothetical reasonably prudent man, he should have so believed. Under this view an actual guilty knowledge as distinguished from negligence on the part of the defendant must be found by the jury.

The instruction given by the trial court in the principal case embodied the second of these rules. The court seems to have followed a form which for some years has been in general use with the trial courts of this state. The existence of this custom is evidenced by the presence of this instruction in lists of instructions set out in the reports of cases in the Supreme Court.¹⁶ In none of the earlier cases was the precise point raised on appeal. In *State v. Kosky*,¹⁷ however, the point seems to have been decided. In this case the state relied on evidence that the accused knew that the boy from whom he took the goods was of dishonest character. The instruction was identical with the one in the principal case. It would seem that under these facts the giving of such an instruction by the trial court, if incorrect, would have been prejudicial to the defendant. The court said: "There was no error in the instructions." But there was no further discussion of

34; *Ogeltree v. State* (1856) 28 Ala. 693; *U. S. v. Moore* (1873) Fed. Case 15803.
11. *U. S. v. Thompson* (1882) 12 Fed. 245.

12. *State v. Roundtree* (1908) 80 S. C. 387, 61 S. E. 1072.

13. *Higgins v. People* (1890) 135 Ill. 243, 25 Am. St. R. 357, 25 N. E. 1002.

14. The best statement of the rule seems to be in *People v. Groves* (1918) 284 Ill. 429, 120 N. E. 277. Lowell, J., in *U. S. v. Moore*, Fed. Case 15803, in speaking of another crime, stated the

principle applied here as follows: "Proof of the reasonable cause of belief may warrant a jury in finding knowledge but it is not the legal equivalent of knowledge."

15. See the following cases: *Adams v. State* (1875) 52 Ala. 379; *Blumenthal v. State* (1904) 121 Ga. 477, 49 S. E. 597; *State v. Goldblat* (1892) 50 Mo. App. 186.

16. *State v. Sakowski* (1905) 191 Mo. 605, 90 S. W. 435, 4 Ann. Cas. 751.

17. *State v. Speritus* (1905) 191 Mo. 24, 90 S. W. 459.

the point here involved. In so far as this case stands for the proposition that mere negligence will take the place of a true guilty knowledge it is overruled by the case under review.

The court in the principal case is silent as to the exact theory of guilty knowledge adopted in this state. Does it, then, intend to require proof of direct knowledge in the sense of the earlier English decisions on the point? It would seem that it does not. The court cited with approval certain Federal cases¹⁸ which display a strong tendency toward the third rule stated above.¹⁹ The Federal Court cited with approval *Cohn v. People*²⁰ where it is stated: "It is true, that proof of direct knowledge is not necessary, and that evidence of facts and circumstances sufficient to create in the minds of the accused a belief that the goods were stolen may amount to guilty knowledge of the fact."

The decision in the principal case fails to notice *State v. Goldblat*²¹ which decided that proof that the accused obtained the goods from a young boy of known bad character at an abnormally low price, was sufficient to warrant the jury in finding that he had a guilty knowledge of the larceny of the goods. Under the theory above elaborated that case may be reconciled with the principal case. In the *Goldblat* case the jury could have found that the defendant had actual belief that the goods were stolen. Therefore it is believed that the case under review does not overrule the *Goldblat* case and that in Missouri the third view stated above is the rule that will prevail.

BEN ELY, JR.²²

EVIDENCE—HUSBAND AND WIFE—CONFIDENTIAL COMMUNICATIONS. *Gisel v. Gisel*.¹ In the above case the St. Louis Court of Appeals decided that in a divorce suit, the plaintiff-wife's testimony of a conversation between herself and husband, not within the hearing of a third person, in which he accused her of infidelity, was properly excluded as a confidential communication. The court apparently realized the undesirability of the holding and came to it with regret that it had no choice

18. *Kasle v. U. S.* (1916) 233 Fed. 878, 147 C. C. A. 552; *Peterson v. U. S.* (1914) 213 Fed. 920.

19. "It is not meant to say, however, that conviction cannot be established upon circumstantial evidence. While there was direct testimony, and specific denial, of guilty knowledge on defendant's part, yet there were in addition circumstances of more or less tendency to show as well as to refute such knowledge; the relevancy of such circumstances, when not too remote, cannot of course be rightly denied; but, apart from instructions as to whether the

property was in fact stolen, no difficulty is perceived in applying the circumstances directly to the accused with a view of testing the question of notice or knowledge on his part, at the times he received the goods and chattels, that they had been stolen (if in fact they were stolen)." *Kasle v. United States* (1916) 233 Fed. 1. c. 886.

20. (1902) 197 Ill. 1. c. 485, 64 N. E. 1. c. 307.

21. (1892) 50 Mo. App. 186.

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1. (1920) 219 S. W. 664.

but to follow *Moore v. Moore*² and *Berlin v. Berlin*,³ previously decided by the Supreme Court of Missouri.

The branch of the law of evidence involved in the decision of this point appears to be in confusion. The chief cause of this confusion has been the failure of the courts to clearly distinguish between: (1) The disqualification of husband and wife to testify for the other;⁴ (2) the privilege against the giving of adverse testimony by one against the other;⁵ and (3) the privilege involved here, i. e. the privilege against the husband or wife giving testimony as to confidential communications.⁶ The American courts have repeatedly grouped the disqualification and the two privileges together in one sweeping and grossly inaccurate rule.⁷ The decisions in this state cannot be excepted from this criticism.

In *Moore v. Moore*, *supra*, the decision was that a husband was a qualified witness where his wife was the opposing party in a divorce suit. The language of the opinion does express a limitation that "they are not allowed to testify in regard to the communications from one to the other"⁸ but this appears to be nothing more than *dictum*.

In *Berlin v. Berlin*, *supra*, an action by the wife for support and maintenance, the wife was permitted to testify as to conversations between herself and husband and as to certain admissions made by him to her. Sherwood, J., in delivering the opinion of the court affirming the general term, which reversed the special term, said: "The witness was clearly incompetent as to any conversations had with defendant, or as to any admissions made to her by him."⁹ At the same time it was made clear that there was no intention to question the rule that either spouse was a competent witness in a proceeding between spouses as to matters other than those set forth in the above quotation. As to the main point the court reasoned in this general and somewhat rhetorical manner:

"Communications of husband and wife *inter sese* are privileged, and are sedulously guarded by seal of that absolute inviolability which the law places upon the hallowed intimacies of the marital relation. So strictly has the law, on the grounds of public policy, enforced the observance of this rule, that

2. (1872) 51 Mo. 118.

3. (1873) 52 Mo. 151.

4. Wigmore on Evidence, section 600, history of the rule; 601, policy of the rule; 603, theory of the common law rule; 604, waiver; 605, who is excluded; 606-609, on whose behalf; 610, effect of death and divorce; 612, exceptions; 619-620, statutory abolition.

5. Wigmore on Evidence, section 2227, history of the privilege; 2228, policy of the privilege; 2230-2231, who is prohibited as husband and wife; 2232-2233, what is prohibited testimony; 2234-2237, what testimony is anti-marital; 2239, anti-marital testimony admitted ex-

ceptionally; 2241-2243, exercise of privilege; 2245, statutory changes.

6. Wigmore on Evidence, section 2332, policy of the privilege; 2333, history of the privilege; 2334, marital disqualification and anti-marital privilege distinguished; statutory enactment; 2336-2338, scope of the testimony privileged; 2339, persons prohibited and entitled; 2341, cessation of privilege. See also 40 Cyc. 2353 par. 3 and cases cited.

7. Wigmore on Evidence, section 2334, the disqualification and the two privileges distinguished.

8. (1873) 51 Mo. l. c. 119.

9. (1873) 52 Mo. l. c. 152.

in no instance and for no purpose has its infraction ever been permitted; and on this point our statute is but declaratory of the common law."¹⁰ (Italics supplied.)

In both cases the court failed to distinguish between (a) the *disqualification* at common law because of interest, (b) the *disqualification* of one spouse testifying for the other, (c) the *privilege* as to one spouse testifying *against* the other, and (d) the *privilege* for confidential communications between spouses. It has been thought in these cases that the statute removing the disqualification because of interest was in effect construed to remove the interest disqualification of the spouse in actions between spouses and also to prevent the exercise of the privilege as to one spouse testifying against the other.¹¹

In *Moore v. Moore*, *supra*, it is not clear that anything besides the disqualification on account of interest was definitely considered by the court. In *Berlin v. Berlin*, *supra*, while the objection was to one spouse testifying against the other, it was stated as if that made the spouse *incompetent*. The disqualification but not the privileges made the spouse *incompetent* at common law. Furthermore, the court in *Berlin v. Berlin* apparently thought that no communications between spouses could be admitted as evidence. There was no such rule at common law. There was a *privilege* as to *confidential* communications, but it is to be remembered that a *privilege* is not the same thing as a *disqualification* and that all communications are not confidential. A disqualification is absolute and need only be called to the attention of the court by either party to be invoked, whereas a privilege can be asserted only by the one to whom it belongs.

Moreover, it soon became necessary for Sherwood, J., himself, to make a distinction between communications generally and *confidential* communications. In *Darrier v. Darrier*¹² an action by the husband against the wife to divest her of title to land, he was held competent to testify as to a communication from himself to the wife on the ground that the rule did not apply to communications not in themselves of a confidential nature. In *Henry v. Sneed*,¹³ where the husband and wife had been induced by fraud to execute a deed of trust, it was held "the testimony of both husband and wife was, *ex necessitate*, competent as to their conversation, on two grounds: that those conversations were a part of the *res gestae*, and on the foot of fraud."¹⁴ Apparently, the conversations between the husband and wife were of a confidential nature. It

10. (1873) 52 Mo. l. c. 152.

11. Wigmore on Evidence, section 2245.

12. (1874) 58 Mo. 222, opinion by Sherwood, J.

13. (1889) 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580, opinion by Sherwood, J.

14. In *Sauter and Adams v. Scrutshfield* (1887) 28 Mo. App. 150 one of the issues was whether the wife had been supplied with the necessities of life by her husband and it was held that a case of that kind should form an exception to the general rule. The fact that she had not been supplied with the necessities

was observed by the court that the cause of action was not one between the husband and wife. But the court failed to observe that it was an adversary and not one of the spouses who objected to the evidence. It is not clear but apparently the husband and wife were the plaintiffs. Obviously, then, there could be no objection because one spouse was testifying *against* the other.¹⁵ Whether they were *disqualified* because they were testifying *for* each other when both were parties in interest was not specifically considered.¹⁶ Considered as a matter of confidential communication, alone, it could have been said that it was not a privilege that the adversary could assert.¹⁷ Nevertheless, the court apparently treated the situation as an *exception* to the general rule concerning confidential communications between husband and wife.¹⁸

It is evident, therefore, that exceptions have been made to the broad proposition stated by Sherwood, J., in *Berlin v. Berlin*. Does an exception exist in divorce suits where the grounds urged to support the action can be proved only by the testimony of the husband or wife as to confidential communications? This precise question, apparently, has not been before the Supreme Court of Missouri since *Berlin v. Berlin*, if it may properly be said to have been before the court then. In *Müller v. Müller*,¹⁹ Lewis, P. J., referred to the problem in this manner: "It has long been settled in Missouri, that charges of infidelity made by the husband without any just cause, are such personal indignities as the statute contemplates in defining the grounds for a divorce. . . . If it be the policy of social regulations in this state, that the making of such charges may properly eventuate in the dissolution of the marriage tie, the question may be asked, how can that policy be sustained by a rule which, in many cases, closes the mouth of the only person who can testify to the injurious fact, and for whose especial protection the law was made?"²⁰

The problem was met in a rather unsatisfactory manner in *Maget v. Maget*.²¹ In a suit for divorce the wife testified concerning the abuse she sustained from her husband, of certain protests and declarations

of life was a matter peculiarly within her own knowledge and in the privacy of domestic life generally unknown to others. It was held that under the circumstances she was a competent witness for her husband-defendant. The court apparently saw no difference between the disqualification of one spouse for the other and the privilege as to one spouse testifying against the other. In *Moeckel v. Heim* (1896) 134 Mo. 576, 36 S. W. 226, a case involving fraud, *Henry v. Sneed* (1889) 99 Mo. 407, 12 S. W. 663, 17 Amer. St. Rep. 580 was cited and followed.

15. Furthermore, the adversary could not ask for the benefit of the privilege. Wigmore on Evidence, section 2241, note 5

16. See Wigmore on Evidence, section 613; *Buck v. Ashbrook* (1873) 51 Mo. 539. See also R. S. Mo., 1909, section 6359.

17. Wigmore on Evidence, section 2340.

18. Wigmore on Evidence, section 2338.

19. (1883) 14 Mo. App. 418.

20. (1883) 14 Mo. App. 1. c. 420. The court states "that while both parties may testify in a divorce suit, neither should be permitted to relate private utterances of any description which have been addressed by the one to the other." 1. c. 421. Despite the admission of such utterances the judgment, *visi*, was affirmed because the error was harmless.

21. (1900) 85 Mo. App. 6.

made by her to him and of his replies thereto. Apparently the communications were confidential. The action of the trial court in granting a divorce was approved. The decision fails to distinguish between the privilege one spouse has to prevent the other from testifying against him or her and the privilege as to confidential communications. It would seem that both privileges were involved. The court discussed the problem as if the former privilege was the only one to be considered. *Moore v. Moore*, *supra*, was cited but it would seem that the *dictum* rather than the decision was in the mind of the court. *Berlin v. Berlin*, *supra*, was not cited and it was not observed that these two cases had removed the *disqualification* on account of interest in actions between the spouses, and the *privilege* of one spouse testifying *against* the other. At least, that seems to be the proper interpretation of those decisions.²² The court in the *Maget* case made its decision on the basis of an exception to the privilege as to one spouse testifying *against* the other. A number of exceptions to this privilege were recognized at common law but it seems that this was not generally extended to divorce proceedings.²³ Furthermore, it would seem that the same exceptions should be recognized as to the privilege for confidential communications.²⁴ Therefore, the *Maget* case would seem to stand for an exception to the privilege as to confidential communications where the exercise of the privilege would work a cruel injustice upon one spouse in controversies between them.

It is not thought that this interpretation of *Maget v. Maget* necessarily conflicts with *Berlin v. Berlin*, *supra*. The latter case is obscurely reported and at most attempts to state a general doctrine. Several decisions by the Missouri Supreme Court sufficiently establish exceptions to the general language.²⁵ It does not appear that there was any compelling necessity for announcing an exception in *Berlin v. Berlin*. But in the case under review the failure to recognize an exception means that a rule of evidence deprives a person of the benefit of a rule of substantive law which is well established as a part of the social policy of the state.²⁶ If this point of view had been taken, the decision in the case under review would not have worked a possible injustice. While the

22. See note 11, *supra*.

23. Wigmore on Evidence, section 2239.

24. Wigmore on Evidence, section 2338, citing the following Missouri cases: *Henry v. Sneed* (1889) 99 Mo. 407, 12 S. W. 663; *Moockel v. Heim* (1896) 134 Mo. 576, 36 S. W. 226, 17 Am. St. Rep. 580; *Rice v. Waddill* (1902) 168 Mo. 99, 67 S. W. 605.

25. See note 24, *supra*.

26. R. S. Mo., 1909, sec. 2370; *Miller v. Miller* (1883) 14 Mo. App. 1. c. 420 (*dictum*); *Clinton v. Clinton* (1895) 60 Mo. App. 296; *Ashburn v. Ashburn* (1903) 101 Mo. App. 365, 74 S. W. 394

(*dictum*); *Rose v. Rose* (1908) 129 Mo. App. 175, 107 S. W. 1089. It may be noticed that confidential statements between the spouses were admitted in the last named case. Since the suit was uncontested there was no objection and the point is not discussed. It seems unsatisfactory to have a substantive right depend upon a contested case and an objection to the testimony. In *Miller v. Miller*, *supra*, it is suggested that a "vituperative epithet" and a "mere protest of a wife against her husband's conduct" could not be a confidential communication; but *quaere*.

distinction between the suggested exception and the decision in *Berlin v. Berlin, supra*, may be a fine one, still it forms the only apparent justification for the decision in *Maget v. Maget, supra*. Since the latter decision is highly desirable it is to be regretted that it was not discussed in the principal case and it is hoped that it will be upheld by the Supreme Court whenever the question is presented there.²⁷

DUPUY WARRICK.²⁸

27. In *Schweikert v. Schweikert* (1904) 108 Mo. App. 477, 83 S. W. 1095 it was said by way of *dictum* that private communications between husband and wife are not admissible but "where from the peculiar nature of the inquiry, the information sought is peculiarly within the knowledge of the wife, the necessity for her testimony may outweigh public policy and the rule disqualifying her as to such statements may be relaxed or suspended." In *Meyer v. Meyer* (1911) 158 Mo. App. 299, 138 S. W. 70, the exception as to the rule for confidential communications is stated in

broad terms but nothing is gained by denominating the communications as "verbal assaults." In *Gruner v. Gruner* (1914) 183 Mo. App. 157, 165 S. W. 865 the same judge who wrote the opinion in *Meyer v. Meyer, supra*, announced by way of *dictum* a conclusion contrary to the one he wrote three years before and admitted that he had stated the rule "too broadly." See *Revercomb v. Revercomb* (1920) 222 S. W. 899 l. c. 905, a decision by the Kansas City Court of Appeals ignoring *Maget v. Maget*.

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BAR BULLETIN

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OFFICIAL PUBLICATION OF THE MISSOURI BAR ASSOCIATION

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CONSTITUTIONAL SUPREMACY—I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the commerce clause was meant to end.—Mr. Justice Holmes, *Collected Legal Essays*, p. 296.

DECLARATORY JUDGMENTS—The Supreme Court of Michigan (Sharp and Clark, JJ., dissenting) has held a declaratory judgment act unconstitutional. It is hoped that the decision (*Anway v. Grand Rapids Railway Co.* 179 N. W. 350) will meet the same fate that *Ives v. So. Buffalo Ry. Co.* 200 N. Y. 271 met. The latter case held a workman's compensation act unconstitutional. But progressive legal opinion would not stand for such a result. There is an excellent comment on the *Anway* case in 19 Michigan Law Review 86. It would seem that the majority of the Michigan court reasoned poorly. There is another article concerning the case in the Journal Issued by American Bar Association, Vol. 6, p. 145.

STOCK WITHOUT PAR VALUE—Twelve states—Alabama, California, Delaware, Maryland, Maine, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Virginia and West Virginia—authorize corporations to issue capital stock of no par value. 19 Michigan Law Review 96. A similar law has been suggested for Missouri. 20 Law Series 66. The object of such legislation is to restrict the possibility of fraud by promoters and stock sellers. The certificate of stock under such a law does not represent on its face that it has any particular value. The only representation is that the owner of the certificate has a certain number of units in a corporation with a certain authorized number of units. It is the dollar mark on the certificate that misleads the unwary.

JUDICIAL SELECTION—In the First Judicial District, consisting of Manhattan and the Bronx, nine Justices of the Supreme Court are to be elected next Tuesday. Five of the sitting Justices, Erlanger, Ford, Giegerich, Guy, Platzek, are indorsed by both parties and will be re-elected. The names of these five have both the party emblems, the eagle and the star, before their names and after them the words "Republican" and "Democratic." Voters should not be confused by this and make the error of voting only for the four candidates who have but the single emblem and the single party description on the ticket. They should vote for nine candidates, not for four merely.—Editorial, New York Times, October 30, 1920.

This is concrete proof of the success the bar associations in the City of New York have had in their efforts to influence the selection of judges. See the articles by Mr. Louis F. Doyle in 20 Law Series 69, 72. There is a committee of the Missouri Bar Association for consideration of the problem.

EDUCATION AND ETHICS—Moreover, education brings with it a sense of proportion and appreciation of essential values which fit the lawyer to bear the moral responsibilities of his profession. It is not without significance from the educational viewpoint that the members of the bar who have been disciplined by the Appellate Division of the Supreme Court in New York City (which has won an almost national reputation by its efforts to rid the bar of its unworthy members) are almost without exception men without any liberal education. The superiority as a whole of the English bar over our own, despite its inferior legal education, is due, I believe, to the fact that most of its members are educated at the universities.—Harlan F. Stone, President's Address, Association of American Law Schools, 1919.

JUSTICE WINSLOW'S SUCCESSOR—Honorable Burr W. Jones, of Madison, a learned and accomplished lawyer, perhaps not inaptly referred to as the Nestor of the Bar of that state, has been appointed to fill the vacancy on the Supreme Court of Wisconsin created by the death of Chief Justice Winslow. As indicating the scrupulous effort made in Wisconsin to keep the selection of members of that Court out of the strife of partisan politics, it is to be noted that Governor Philipp, a Republican, in view of the fact that the late Chief Justice was a Democrat, appointed Mr. Jones, a life long Democrat, to fill the vacancy until an election in 1922. The latter does not succeed, however, to the Chief Justiceship as that goes to the Justice oldest in commission.—VI. Journal Issued by American Bar Association, p. 67.

If the Wisconsin point of view could obtain in Missouri a long step in advance would have been taken.

BAR ASSOCIATION INFLUENCE—The vacancy on the public service commission, made by the resignation of Judge John Kennish, will be filled by John E. Kurtz, an attorney here, it was announced late today.

When Judge Kennish resigned to become master in chancery in the street railways receivership here, Governor Gardner told Arthur M. Hyde, governor-elect, he would appoint to fill the vacancy the man Hyde named. Mr. Hyde asked John Pew, President of the Kansas City Bar Association, to name Judge Kennish's successor. Mr. Pew conferred with members of the association and decided upon Mr. Kurtz.—The Kansas City Star, December 3, 1920.

Governor Hyde started his administration auspiciously. There is a need for bar associations and lawyers should be alert to their public responsibility. The public is ready to listen to the advice given by responsible and well conducted bar associations as to the qualifications of men for judicial or quasi-judicial offices.

HATEFUL MONOPOLIES—Monopolies are hateful to the law. It is against sound public policy to encourage them.—Williamson, J., in *State v. Cupples Station Light, Heat & Power Co.*, 223 S. W. 1. c. 83.

But can it be said to be against public policy for a monopoly to exist among public service institutions? See Wyman on Public Service Corporations, Vol. 1, Sec. 51. Nor were monopolies at all hateful in an early day. "Indeed, a regulated monopoly with the corresponding obligation of public service seemed in that age to the great majority of people far better than an unregulated competition without public obligation." Wyman on Public Service Corporations, Vol. 1, Sec. 2.

MISSOURI BAR ASSOCIATION MEETING

The annual meeting of the Missouri Bar Association was held in St. Louis December 3 and 4. The attendance was disappointing. The program was interesting and above expectation. More important, the association displayed a willingness to do something more than talk. The action taken was largely in the way of appointing committees. If careful selections are made and the proper energy is placed behind the organization during the present year there is reason to hope that the association will enter upon a new era.

The opening address of Mr. Frederick W. Lehmann, president of the St. Louis Bar Association, emphasized the necessity of doing everything possible to make criminal law and criminal procedure effective in order to prevent the hordes of vice from overrunning us. He also directed attention to the work of the St. Louis Bar Association with reference to judicial candidates in the primary and general elections and predicted that hereafter the recommendations would be given greater consideration by political organizations.

The response was well handled by Mr. Murat Boyle of Kansas City, who advocated the elimination of meaningless refinements and restrictions which now surround the preparation of an abstract of the record.

President Lamar delivered an interesting address. He advocated two measures of importance. The first concerned the movement to secure court made rules of procedure. Such has been the position of the American Bar Association for some years and there is reason to expect that Congress soon will authorize the Supreme Court of the United States to make the rules on the law side as it now does on the equity and admiralty sides. The other measure would secure a legislative reference bureau for Missouri. On motion the first proposal was referred to the Committee on Judiciary, Amendments and Procedure, which, unfortunately, for lack of a quorum failed to have a meeting. The second was adopted by the association and included in its legislative program.

The address delivered by Commissioner John T. White dealt with a subject about which nothing new can perhaps be said. Nearly every lawyer has a definite opinion upon the justification given by the courts in declaring laws unconstitutional. Perhaps the importance of the subject is overemphasized. At least Mr. Justice Holmes has ventured to assert that in his opinion society would continue to function even if state courts were denied the power and the federal courts were denied the power so far as the acts of Congress are concerned. On the contrary he has thought that the United States of America would be in danger if the various states could adopt laws in violation of the federal constitution. In any event Commissioner White achieved distinction by the literary style of his argument that made its reception a pleasure.

JUDGE OLSON

No doubt the feature of the program was the address delivered by Judge Harry Olson on the "Municipal Court of Chicago and Its Psychopathic Laboratory." There seemed to be no doubt that the speaker convinced his audience that justices of the peace should be supplanted by a municipal court in large urban communities. Later the association went on record as favoring a system of municipal courts for the larger cities of Missouri provided it would not be in conflict with the constitution of the state.

Judge Olson is a very entertaining speaker and tho his address lasted about two hours those in his audience were sorry when he ceased. Since then he has been heard by the Kansas City Bar Association. The state will owe him a debt of gratitude if his influence results in the abolition of justices of the peace in St. Louis and Kansas City. As Judge Olson said in St. Louis, justices of the peace were established in an early day in England to combat brigandage in rural districts but in the present generation it had been found necessary to establish municipal courts to stop the brigandage of the justices. It is an idle dream to attempt to render justice through men who are untrained for the task and without any professional ideals.

SOCIAL AFFAIRS

The St. Louis Bar Association very pleasantly entertained the members of the Missouri Bar Association the night of December 3 with a buffet supper at Hotel Jefferson. The feature of the evening was a very brilliant oratorical address on "The Country Lawyer" by Mr. Thomas Dumm of Jefferson City.

Saturday night the annual banquet was held in the Statler Hotel. Judge John S. Farrington presided as toastmaster. Mr. Fred Dumont Smith of Hutchinson, Kansas, spoke learnedly about "The Kansas Industrial Court." Apparently he convinced some who had been skeptical of the plan. He insisted that the organization was not for the purpose of securing compulsory arbitration under the name of a court but that the purpose was to avoid compromises (usually the result of arbitration) and to obtain a legal determination upon principles of justice.

Judge K. M. Landis delivered a characteristic address. He spoke on the enforcement of criminal law and the parole system. He also took occasion to announce that he expected to spend the next seven years as the head of organized baseball and at the same time retain his judicial position. He recognized the criticism he had received and announced that he was ready to resign if Congress should so request.

COMMITTEE REPORTS

The most carefully considered and the most important report presented was that of the Committee on Legal Education. The chairman, E. L. Alford, presented a proposed bill which, if enacted, would provide two requirements preliminary to the examination given by the State Board of Bar Examiners. One is that the applicant shall have had a standard high school education and the second is that he shall have undergone a course of legal training for three years of thirty weeks each year in some law school or office approved by the Supreme Court. The bill was made a part of the legislative program with the understanding that the second requirement could be met by combining training in an approved law school with that received in any office approved by the Supreme Court.

The Committee on Uniform Legislation recommended that the uniform law for probate of wills be urged upon the legislature and that the latter body be requested to provide for expenses of the Commissioners On Uniform State Laws.

MISCELLANEOUS BUSINESS.

On the motion of Mr. John M. Atkinson, a committee was authorized for the purpose of doing as much work as possible on suggestions for the constitutional convention in case one is authorized by the voters at the special election to be held next August as was provided by the adoption of Constitutional Amendment 15 last November. This is an important work. Conventions have been held in several states in recent years including New York, Arkansas, Nebraska and Illinois. We should know the proposals before these conventions, the arguments and the determinations.

Senator G. H. Whitecotton of Moberly, presented a proposal to withdraw judicial candidates from the primary system. The proposal was approved and it is hoped that the present administration will favor the suggestion.

CONSTITUTIONAL AMENDMENTS

The Association adopted an amendment to its constitution providing that the Secretary shall be elected. The desire was that the Secretary should be practically permanent in order that there may be continuity in the work of the Association. The annual election makes it possible to make a change whenever the Secretary proves unsatisfactory.

The proposed amendment which would provide a method whereby the Bar Association would become an active force in the selection of

candidates for the appellate courts was the subject of interesting discussion. All but one speaker favored the general plan but it was decided to refer the matter to a special committee of three to be appointed by the President. It is anticipated that the report of this committee will be one of the main subjects of discussion at the next annual meeting. The Michigan Bar Association has a similar proposal under consideration. As long as our judges are elected by the voters and are also subject to the primary system some such system seems to be the only way out of the wilderness.

Columbia, Missouri.

KENNETH C. SEARS

COMMITTEES—President Curlee has appointed members to the various committees. It is believed that he has displayed sound judgment. He evidently acted upon the principle that it is necessary to appoint men who are interested in the work rather than men who are either personal friends or who would give merely distinction to the committee because of their positions or attainments. The Missouri Bar Association should become more efficient under the leadership of the committees and none of the sociability will be lost.

The Committee on Grievances and Legal Ethics is of particular interest. In less than a month after the St. Louis meeting three complaints of Missouri lawyers had been received by the Secretary. One was from a business organization in New York. It should be obvious that there should be a clearing house for such complaints. Otherwise, the profession in this state would suffer. The Missouri Bar Association should be the general clearing house.

LEGAL EDUCATION—The by-laws of the Section require the Council to investigate the entire subject of legal education and make a report as to what course is needed to bring about reform. In plain language, the purpose is to show up the proprietary law schools which have slight facilities for teaching law and exist for the benefit of their owners rather than for the good of the students or the public. In no other profession have requirements been so slack in recent years. Law teaching is overdue for a cleaning up. But the work is unpleasant. Apparently afraid that the Council would not do its full duty in the premises, a motion was offered by William Draper Lewis to create a special committee to do what the by-laws require of the Council. Action was deferred until the last session and then the resolution was modified so that it merely directs the Council to investigate and report.—Editorial Note, American Bar Association Meeting, Illinois Law Review, Vol. XV, p. 208.

ELECTION RESULTS FROM ST. LOUIS

The result of the general election in St. Louis in November is an encouragement to all who are sincerely interested in placing judges on an elevated plane. The St. Louis Bar Association made certain recommendations for the judicial candidates of the two leading parties prior to the primary. These were accepted by the Democratic organization. The Republican organization (except the Koeln-Foristel forces) felt certain of its power and insisted upon judicial offices as a spoil. The result of the primary indicated that in St. Louis the independent voter was ready to welcome the advice of the Bar Association though only one out of four Republican candidates recommended was nominated.

But the contest, thus started, continued into the general election. Kimmel, Killoren and Krueger, the three candidates nominated by the machine, met with organized opposition. Many women organized to contest candidates for judicial offices who were without the support of the Bar Association. The St. Louis Globe-Democrat, the St. Louis Post-Dispatch, and the St. Louis Star gave encouragement to the contest and called upon the Bar Association to carry on. Since the election of Judge Grimm, the only Republican nominee recommended by the Bar Association, seemed practically certain, C. B. Williams, one of the Democratic nominees, in order to concentrate the vote against the other two Republicans, withdrew from the race and thus allowed the vote to be concentrated upon Judge Grimm, Republican, and Franklin Miller and R. A. Jones, Democrats, all of whom had the endorsement of the Bar Association. The result was the election of Judge Grimm and of Franklin Miller. Mr. Jones failed of election by a small margin.

The other contest was over the judgeship of the Court of Criminal Correction. There Anthony Hochdoerfer, Democratic candidate and endorsed by the Bar Association, defeated the Republican candidate who was nominated in opposition to the recommendation of the Bar Association.

The result is exceedingly encouraging in view of the very large majority given to the Republican candidate for President in St. Louis. The St. Louis Bar Association is to be congratulated. So are the women who believed that justice is above the party. So is C. B. Williams, the Democratic candidate, who asked voters not to vote for him in order to concentrate strength upon the others who had been endorsed by the Bar Association.

Meantime the Kansas City Bar Association was unwilling to undertake a like public service. So it would seem. Perhaps the officers alone were not alert and failed to recognize their duty.

In view of the experience in St. Louis and in view of the excellent work done in New York, it is time for the Missouri Bar Association to

undertake a like service with reference to candidates for state appellate courts.

It must be remembered that in so doing the Missouri Bar Association would be giving effect to the principle so often adopted and endorsed. The second of the Canons of Ethics reads as follows:

"It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves."

Columbia, Missouri.

KENNETH C. SEARS

CASE SYSTEM—Within the recollection of most of us many of the abler practitioners of the bar doubted the efficacy of the case system and questioned whether the methods of instruction and the general aims of Harvard, Columbia, and the University of Pennsylvania, which at that time were the only schools using that system, were desirable, or would produce well-trained lawyers. The apprentice-trained students and the graduates of the part-time law school had no difficulty in securing positions in the best offices. Most of us have witnessed a complete change of attitude in these two respects. The greater number of schools in the country are following, or trying to follow, the methods of instruction which were then followed by the three schools first mentioned, and which are now advocated by this Association, and even some of those which do not follow it advertise that they do.

In the large centers the offices which are doing the important work of the profession desire as clerks only those students who have had the best law school training. The preponderance of college graduates in the schools of this Association (to be exact, 74 per cent. of all college graduates studying law are students in Association schools) indicates clearly enough the preference of educated men for schools founded on sound educational principles.—Harlan F. Stone, President's Address, Association of American Law Schools, 1919.

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BAR BULLETIN

LARCENY OF REFERENDUM PETITIONS

(Concluded)

BY

KENNETH C. SEARS

NOTES ON RECENT MISSOURI CASES



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Larceny of Referendum Petitions

(CONCLUDED)

I. AMERICAN DECISIONS.

New York made a false start in 1810.¹ Payne was convicted of stealing a letter, charged to be "a piece of paper, on which a certain letter of information was written, of the value of twelve dollars and fifty cents." The poorly considered *per curiam* opinion reasoned thus, in quashing the conviction:

"The letter was of no intrinsic value, not importing any property in possession of the person from whom it was taken. A bond, bill, or note, was not the subject of larceny, at the common law; and they certainly had as much worth in themselves as this letter. (1 Hawk, C. 33, S. 22)."

Such may be expected to be the result when courts and writers attempt to give a justification for a rule that arose as a *dictum* and always remained without a sound principle. The reasoning of the New York court, however, is based upon a premise that ignored half that was said to justify the common law rule as to choses in action. With a chose, if the writing was gone the obligation remained. With a letter if the writing was gone all was gone unless perchance the contents had been memorized.

Defendant was convicted of receiving personal property knowing it to have been stolen. Part of the property stolen was "ten promissory notes, commonly called bank notes", "complete in form but not issued".² In answer to counsel for defendant,³ the court said:

"The charge refers to written contracts filled up and remaining at the bank, which, on being lawfully put in circulation, would have subjected the bank to pecuniary liability. That such papers were the property of the bank, is entirely clear; and this answers the exception. It is now said

1. *Payne v. People* (1810) 6 Johnson (N. Y.) 103.
2. *People v. Wiley* (1842) 3 Hill (N. Y.) 194.
3. "The court erred in ruling that the bank bills described in the indictment were *property*, within the meaning of the statute". l. c. 201.

they were of no value; but that was not the exception. It is obvious, however, they were of some value; and that, I apprehend, is enough. - - - - - The recent case of *Payne v. The People* (6 John, R. 103.) went on the ground that the letter stolen was of no intrinsic value whatever, even as a piece of paper. There is no color here for saying that, of the bank issues. There are several cases in point. (*The King v. Clarke*, 2 Leach, 1036; *Rex v. Vyse* Ry. & Mood. Cr. Cas. 218.)"⁴

This case accords with the English cases in holding generally that written instruments are subject matter for larceny. It should be contrasted with the doctrine urged by defendant in the case under review that the petitions became public documents before they were filed.

In *People v. Loomis*⁵ the indictment was for larceny of "a certain receipt". Defendant owed one Shepard seven dollars and proposing to pay the debt took out of his pocket some bank notes and a prepared receipt. The latter was handed to Shepard for signature. The notes were handed to Ramsdell (joint defendant) and the defendant told Shepard that the money was ready as soon as the receipt was signed. Shepard signed the receipt and gave it to Ramsdell who failed to transfer the bank notes but ran away with defendant at latter's request.⁶ The Supreme Court of New York ordered a new trial, following conviction, stating that "the prisoners should have been acquitted".⁷

The court argued that under neither the English statutes nor the legislation in New York (punishing the theft of written instruments creating or affecting obligations) could the theft of an ineffective written instrument be punished. Then it was argued that the receipt there was totally ineffective because of the fraud

4. *People v. Wiley* (1842) 3 Hill (N. Y.) 1. c. 211.

5. (1847) 4 Denio 380.

6. The receipt was in the following words: "Rec'd of G. W. W. Loomis seven dollars in full of all demands of every name and nature up to this day. Dated." etc. 4 Denio 380.

7. (1847) 4 Denio 380.

connected with its execution. It is not clear but apparently the court conceived of the legislation in New York as the sole source of authority to punish for larceny. There was no residuum of common law. If such was the point of view it constituted a bold stroke and one that was not suggested by the English cases decided after English statutes extended the scope of larceny.

There seems, however, a basis for justifying the decision as a matter of principle. It was noted in the outset that the indictment was for theft of "a written receipt". There is no mention of a second count for theft of "a piece of paper". If there had been such a count the decision might have been contrary.⁸ Otherwise, one of two things would have been fairly certain: (a) statutory legislation wiped out the common law; or (b) common law conceptions were hopelessly confused.

It is also possible to justify the result upon the assumption of a second count charging the theft of "a piece of paper". The *paper* on which the receipt was written was the *property* of *defendant*. It is also certain that it was in his *possession* until he handed it to Shepard *for signature*. It is *arguable* that thereby he transferred only *custody* of the paper to Shepard and that *possession* always remained in defendant. If so, there was no larceny.⁹

In *People v. Griffin* the charge was larceny of "a tin box of the value of five dollars, and certain papers described as instruments in writing, consisting of three several receipts for money, and three certificates of stock in incorporated companies".¹⁰ It was held by Kings County Court of Sessions that un-

8. The court in discussing the common law stated: "But although such instruments could not, in strictness, be stolen, the paper or parchment on which they were written might be, and prosecutions for petty thefts of this description have frequently taken place." Among others, *Clarke's Case*, R. & R. 181, *Vyse's Case*, 1 Moody 218, *Rex v. Bingley*, 5 C. & P. 602 and *Rex v. Mead*, 4 C. & P. 535, were cited. See a discussion of these cases in 21 Law Series p. 13 ff.

9. See 21 Law Series p. 18, note 46 and p. 23, note 60.

10. (1869) 38 Howard's Pr. Rep. 475.

der the statute¹¹ "common" receipts were not subject of larceny.¹² The court distinguished "between common receipts and accountable receipts, warehouse receipts and others of such nature". "Receipts of this latter description are undoubtedly the subject of larceny, but I am satisfied that common receipts were not intended to be and are not embraced within the provisions of the statute."¹³ So much goes only to the question of the proper interpretation of the statute. Apparently, no consideration was given to the thought that a "common" receipt considered as a piece of paper constituted "goods", "chattels", and "effects" within the meaning of the statute. Apparently also, as usual in New York cases, there was no charge in the indictment of the theft of "a piece of paper".

Furthermore, the court argued that "common" receipts are not instruments.¹⁴ If this be true it is difficult to understand

11. The statute defined personal property to mean "goods, chattels, effects, evidence of right in action, and all written instruments by which any pecuniary obligation or any right or title to property, real or personal, shall be created, acknowledged, transferred, increased, defeated, discharged or diminished". l. c. 477. See *People v. Babcock* (1810) 7 Johns, 201, 5 Am. Dec. 256: (Obtaining a written receipt and request by a false assertion does not constitute a cheat, because (1) no false token used and (2) ordinary prudence guards against it. Whether a written instrument is subject matter of cheat not argued.) *Phelps v. People* (1878) 72 N. Y. 334 (Conviction affirmed for larceny of a draft under a statute defining personal property so as to include "all written instruments by which any pecuniary obligation - - - shall be created, acknowledged, transferred" etc.)
12. The Supreme Court of New York made a contrary suggestion in *People v. Loomis* (1847) 4 Denio. l. c. 384: "It perhaps admits of no doubt that a receipt for the payment of a debt or demand may be the subject of larceny, under the revised statutes, - - - ." The "revised statutes" seems to refer to the same provision as set forth in note";¹⁵ *supra*.
13. *People v. Griffin* (1869) 38 Howard's Pr. Rep. l. c. 478. Compare *State v. Scanlan* (1903) 89 Minn. 244, 94 N. W. 686.
14. "Now common receipt such as are described in the indictment cannot be properly called instruments at all, for such documents have

how the decision was helpful to defendant in *State v. McCulloch*. The argument in the latter case was built upon the premise that a referendum petition is a written instrument. Whether the premise is acceptable depends upon terminology. The New York court gave no satisfactory definition of a written instrument.

As to that part of the charge involving certificates of stock the court held that the subject matter was covered by the statute but a new trial was ordered for failure to prove sufficient value to show grand larceny.

In 1885 the Supreme Court (fifth department) of New York rendered a decision similar to that in *People v. Loomis, supra*.¹⁵ Ella Comstock, the owner of a house and lot, had mortgaged the same to Sarah Comstock and then made an agreement to sell the property to defendant. The mortgagee prepared a discharge of the mortgage lien to be used upon certain conditions which were never met. The discharge was secured by defendant through fraud and placed on record. For this defendant was convicted of larceny but a new trial was ordered. The court reasoned that: (a) the instrument was not effective or operative for any purpose at the time the defendant acquired possession; and (b) "to constitute larceny of a written instrument, the paper must be effective and operative when taken".¹⁶ There is no difficulty in agreeing with proposition (a) but as to (b) it must be recorded that the statement is contrary to many decisions in cases where the indictment charged the stealing of a piece of paper.¹⁷ Furthermore, it is interesting to notice that

no legal effect as instruments whatever, they are at most but acknowledgments in writing of full or partial payment and may be used in evidence to prove such payment. But they cannot be pleaded, and when proven may be explained or contradicted; they are mere written admissions and can only be treated as such. - - - - There is a broad distinction between legal instruments which are acts and mere written admissions which are only evidence."

15. *People v. Stevens* (1885) 38 Hun. 62, 3 N. Y. Cr. R. 583.

16. *People v. Stevens* (1885) 38 Hun. 62 l. c. 64, 3 N. Y. Cr. 583.

17. See review of English decisions in 21 Law Series p. 13 ff.

the position of the New York court seems contrary to that taken by counsel for defendant in *State v. McCulloch*.¹⁸

The court was not at liberty to reverse the conviction on the common law theory that the instrument "savoured" of the realty. In the first place it would seem proper to point out that the instrument was not a deed of release until it had been delivered. Whether the common law exemption as to instruments "savouring" of the realty applied *only* to valid and effective instruments is not possible of dogmatic assertion.¹⁹ In any event a New York statute²⁰ made an instrument by which "any pecuniary obligation, right or title to property" is transferred or defeated personal property and by inference subject to larceny. Another statute²¹ provided that certain specified instruments in complete form but not effective as obligations

18. Counsel for defendant in *State v. McCulloch* deemed it of importance to convince the court that the instruments were completed in order to say that they were *not*, therefore, subject matter of larceny. The following is typical of the position taken: "If the instrument is completed, that is all that is necessary, and the charge must be for taking the instrument, and such an instrument is not the subject of larceny; and this is true, irrespective of the fact whether it is or is not a public document."
19. This particular point was not considered by the court. It was content with announcing that if the instrument had been complete the act would have been larceny under the statute. To that extent the statute changed the common law as to instruments "savouring" of the realty.
20. The Penal Code defined personal property as "every description of money, goods, chattels, effects, evidence of rights in action, and all written instruments by which any pecuniary obligation, right or title to property, real or personal, is created, acknowledged, transferred, increased, defeated, discharged, diminished, and every right and interest therein." *People v. Stevens* (1885) 38 Hun. l. c. 65, 3 N. Y. Cr. R. 583. Compare: R. S. Mo. 1909, Sec. 4927, now R. S. Mo. 1919, Sec. 3716.
21. "An instrument for the payment of money, an evidence of debt, a public security, or a passage ticket, completed and ready to be issued or delivered, although the same has never been issued or delivered by the maker thereof to any person as a purchaser or owner." *People v. Stevens* (1885) 38 Hun. l. c. 65, 3 N. Y. Cr. R. 583.

should be subject to larceny. The latter statute did not include the instrument under consideration and the court did not think of the statute as merely declaratory of a part of the common law. Apparently it was thought that the statute by mention of certain instruments assumed that the common law was different as to other ineffective instruments. Accordingly, *People v. Wiley, supra*, was treated as an exceptional case. It seems fair to say that this interpretation derives no support from the cases decided in England.

As in *People v. Loomis, supra*, there was a failure, apparently, to add a second count to the indictment charging the theft of "a piece of paper". If that had been done the story might have been a different one.

*People v. Hall*²² is perhaps the unfortunate offspring of *Payne v. People*.²³ Defendant in attempting to obtain title to a tract of land had negotiations with Mrs. Burham with reference to her claim of a lease of part of the property. As a result he signed the following instrument:

"I hereby agree to pay Mrs. C. M. Burham the sum of \$200 for a release of twenty feet of ground on side of building, and this note is to be null and void if Mrs. Enie V. Coppelman does not pay me \$1,000."

Later defendant snatched the instrument from Mrs. Burham's hand and destroyed it. The court (two to one) held that the conviction would have to be reversed, saying in part:

"The note or paper was not property. It rested on nothing. Mrs. Burham made no written agreement to release, and her verbal promise was void - - - - -. The note was only a provision by Hall to take a title which Mrs. Burham was not bound to give, nor Hall to take. Such a paper is not the subject of larceny. *Payne v. People*, 6 Johns, 103."

The dissenting judge held that the instrument was "evidence of debt or contract" under the statute.²⁴ This position may be

22. (1893) 74 Hun. 96, 26 N. Y. Supp. 403.

23. See p. 00 *supra*.

24. The statute included as subjects of larceny "any money, personal property, thing in action, evidence of debt or contract, or articles of value of any kind."

questioned if the instrument created no obligation. It does not appear how the instrument was described in the indictment. Except for *Payne v. People*, *supra*, and cases following it in New York, there is no reason why the conviction could not have been sustained as larceny of a piece of paper if the indictment had been properly drawn.

The decisions in New York are far from satisfactory. Not once has a court in that state (so far as cases reviewed have disclosed) shown any thoroughgoing appreciation of the common law doctrine as to written instruments as it was developed in England. On the contrary the decisions give the impression that New York as to this matter was a star out of its orbit, accepting the worst part of the past as fundamental and ignoring the developments in the British courts. Part of it may be accounted for in the false start in *Payne v. People*, *supra*, a poorly considered opinion. Part of it may be due to an apparent failure of prosecuting officials to adopt the simple device of adding counts to indictments charging theft of "a piece of paper". Part of it may be attributed to an unfortunate tendency to consider statutes as a substitution for the entire common law as to larceny rather than as changes of that law with a view of making it more adaptable to social needs.

After it was too late, so far as New York was concerned, a North Carolina judge displayed a real knowledge of the fundamentals. At least, Merrimon, J., in *State v. Campbell*²⁵ seems to have had a clear conception of the common law rule as to written instruments as developed in the English cases. The charge was for stealing "one due-bill of the value of fifty-four cents, of the goods, chattels and moneys", etc., under a statute penalizing the theft of "any order, bill of exchange, bond, promissory note, or other obligation, either for the payment of money or for the delivery of specific articles". There was evidence that the due bill stolen was one that had been taken up by the person who issued it. The lower court declined to instruct that if the

25. (1889) 103 N. C. 344, 9 S. E. 410.

due bill had been paid off and taken up and was worthless it was not the subject of larceny. The Supreme Court held that the refusal was error and ordered a new trial.

The court exhibited a clear understanding of the common law rule as to choses in action²⁶ and stated a due bill would be an "obligation" within the meaning of the statute but that a paid

26. "They are valuable and useful as such evidence, and, for the purposes of the statute cited, have no other property or quality of value; however, the paper or other thing on which they may be written might possibly be treated as bits of personal property of trifling value, and therefore the subject of larceny at common law. Indeed, in cases similar to the present one, it has been not uncommon as a measure of caution, to put two or more counts in the indictment, charging in the first one, the larceny of a note, bond, or other thing mentioned in the statute; and also, in a second one, the larceny of the paper on which they were written. - - - - It would not comport with just and settled criminal procedure to indict a person for the larceny of a promissory note, and allow him to be convicted upon such charge of stealing a piece of paper."

Compare the statement of Shaw, C. J., in *Commonwealth v. Rand* (1844) 7 Met. (Mass.) 475: "No question was made at the argument, though it was open on the exceptions, whether bank bills, after they are redeemed by the bank, are the subject of larceny. Bank notes are expressly made the subject of larceny by the Rev. Sts. c. 126, par. 17. Is there any implied exception of bank notes redeemed by the bank issuing them? We think not. The bank in the present instance, were owners of the paper, which was of some value to be re-issued, and they had the actual possession, by their agent, and the perfect right of possession. But a consideration of more importance is, that notwithstanding the bills were stolen, yet, on being passed to a *bona fide* holder, the bank would have been bound to him for the payment of them, in the same manner as if they had not been redeemed. The injury to the bank is therefore the same."

Kearney v. State (1877) 48 Md. 16: (statute prohibited receiving a stolen bond. The indictment charged defendant with receiving "four pieces of printed paper commonly called 'United States five-twenty bonds'." Held bad for failure to distinctly charge that the "four pieces of printed paper" were bonds. *Arguendo*: "It has been sometimes the practice, under statutes similar to this section of our Code, to introduce into the indictments *separate counts*, charg-

due-bill ceased to be an "obligation" and therefore not "the subject of larceny as a 'due-bill' or an 'obligation'". The suggestion was made that if the indictment had contained a count for larceny of the paper on which the due-bill was written the defendant might have been convicted properly. The New York cases of *People v. Loomis*, *People v. Griffin*, *People v. Stevens* and *People v. Hall*, *supra*, might have been handled on the same basis.

In 1815 the Supreme Court of North Carolina²⁷ quashed an indictment charging petty larceny of "one half ten shilling bill of

ing the larceny or receiving of 'one piece of paper of the value of one penny', and in several cases which have been cited by counsel for the state, such counts have been held sufficient to support a conviction. This practice was adopted in order to obviate the difficulty in setting out doubtful instruments, or to meet a failure of proof as to instruments duly charged in other counts. If there had been such separate count in the present indictment, it might, under these authorities, have been sustained." 1 c. 26)

Keller v. United States (1909) 168 Fed. 697: (indictment charging theft of "six blank checks with stubs attached, each of the value of one cent, of the goods and personal property of the United States" held sufficient to sustain a conviction.)

People v. McGrath (1888) 5 Utah 525, 17 Pac. 116: (conviction for theft from a court reporter of "11 of his books, containing a phonographic report of the testimony of witnesses examined on the trial" of a certain case.)

State v. James (1877) 58 N. H. 67: (held that printed list of names of subscribers to a newspaper together with dates of the periods to which they had paid subject of larceny as a chattel and not as evidence of a debt.)

People v. Carides (1915) 21 Cal. App. 836, 154 Pac. 1061: (held that lottery ticket, void because issued in violation of law, could not be subject of a *grand* larceny as a lottery ticket. Said as *dictum*: "Considered as a mere piece of paper, the lottery ticket in question possessed perhaps some slight intrinsic value, which, however small, would have sufficed to make the wrongful taking of it *petit* larceny, and, if that had been the charge preferred against the defendant, it doubtless would have stood the test of demurrer.") See 4 Calif. Law Rev. 251.

27. *State v. Bryant* (1815) 4 N. C. 249.

the currency of the state" etc. The rather meaningless opinion was as follows:

"The thing charged to be stolen is not stated with the requisite precision and distinctness, to authorize the court to pronounce judgment upon the offense, in the event of a conviction. Considered as currency of the state, it is of no value, since no one is compellable to receive it; it is not a tender in payment. Nor could the defendant, by the description in this indictment, protect himself from a future prosecution for the same larceny. As it is actually described, there is no such thing known in the currency of the state; as it was probably meant to be described, it is not punishable as a larceny. Being therefore destitute alike of artificial and intrinsic value, the indictment cannot be supported."

This decision was rendered before the English doctrine of indicting for theft of a piece of paper had been well developed²⁸ and there was here no count of such import.

28. 21 Law Series p. 15.

Boyd v. Commonwealth (1842) 1 Rob. (Va.) 691. (semble, larceny of "divers goods and chattels" shown by proving theft of "divers checks, bank notes, and *United States* treasury notes". Whether decision was under statute or common law not clear.)

Ryland v. State (1857) 4 Sneed (Tenn.) 357. (theft of pocket book containing bank notes. "It is not, nor could it be, controverted that genuine bank notes are the subject of larceny in this state.")

Thomasson v. State (1857) 22 Ga. 499 l. c. 505: ("At common law, bank notes being mere evidences of debt, were held to be not such goods and chattels of which larceny might be committed. Cobb 793. Our statute, however, declares that the taking and carrying away a bank bill belonging to another, with intent to steal the same, shall be simple larceny.")

Johnson v. State (1860) 11 Ohio State 324: (bank bills held not to be money within the meaning of the statute. Court willing to give such a construction except that other sections in the statutes forbade such a construction.)

United States v. Morgan (1805) Fed. Case No. 15808: (held that charge of receiving a bank-note under federal statute mentioning "goods and chattels" only could not be supported. Strict following of common law rule that a bank-note being a chose in action is not subject matter for larceny.)

In *Culp v. State*²⁹ the indictment charged of the theft of: (1) "seven paper bills of credit, on the Bank of the United States", (2) "seven bank notes on the United States Bank" and (3) "seven paper bills of credit." The judgment of conviction was arrested. An Alabama statute made "promissory notes for the payment of money" subject matter of larceny. The first count was held defective because the Bank of the United States was prohibited from issuing bills of credit of the value of those described. The second count was held defective because bank notes were not within the terms of the statute.³⁰ The third count was bad because a state could not issue bills of credit under the federal constitution. Congress had exercised its power through the Bank of the United States alone and from this point of view they were bad for reasons stated above. Whether bills of credit could have been issued by an individual or private corporation was not discussed. Observe also that there was no count for theft of seven pieces of paper.

State v. Colvin (1849) 22 N. J. L. 207: (receiving stolen bank-bills not a violation of statute punishing the reception of stolen "goods and chattels.")

United States v. Bowen (1817) Fed. Case No. 14628: (stealing bank note no offense at common law.) *U. S. v. Carnot* (1824) Fed. Case 14726, accord.

29. (1834) 1 Porter (Ala.) 33, 26 Am. Dec. 357.

30. The Court argued that bank notes and promissory notes were so different "in legal apprehension and common acceptation" as to forbid the deduction that one was embraced by the other "in contemplation of the legislature". Compare: *Wilson v. State* (1834) 1 Porter (Ala.) 118: (prosecutor under agreement made out four promissory notes. Later he delivered them to defendant upon condition that latter pay the sum stipulated; but defendant escaped from prosecutor's presence without doing so and disposed of the notes as his own property. Held not larceny under statute since notes were invalid. *Rex v. Phipoe*, 21 Law Series, note 60, cited.)

Collins et al v. People (1866) 39 Ill. 233: (U. S. treasury notes held to be goods and chattels so far as the formality of the indictment is concerned. The statute is not set out but apparently included "bond, bill, note" as subject of larceny. Held, also, that there could be no conviction unless the notes were genuine. Nothing

In *Moore v. Commonwealth*³¹ the indictment under a statute punishing false pretences alleged in part that defendant did "by means of the aforesaid false pretence, obtain from the said Philip Harman, *a receipt of great value, to-wit, a receipt in full for the payment of money, to-wit, for the payment of \$8.78*", etc.³² (*Italics supplied.*) The evidence was that defendant was indebted to Philip Harman and in part payment gave Harman a five dollar bank note, the said bank note having been issued by a bank that had failed several years before. The statute punished the obtainment by false pretence "*any money, personal property, or other valuable things.*" The Supreme Court by a three to two decision reversed the judgment of conviction. Two reasons seem to have prompted the decision: (a) the receipt was of no value; and (b) the object of the statute "was to prevent the obtaining of money or goods or other valuable things by false tokens or false pretences, and has no relation to the payment and settlement of old debts and accounts".³³

It is to be observed that the indictment was in one count and there was no charge of obtaining "a piece of paper". The decision means, therefore, that a voidable receipt was not *as such* personal property under the Pennsylvania statute. It is not a decision that "a piece of paper" is not personal property within the protection of the criminal law. The suggestion that property must have a saleable value does not seem correct on principle.³⁴

W. J. Wilson was indicted for the theft of "the following

to show that they were otherwise than genuine and court was not presented with the problem of considering whether as pieces of paper they might be the subject of larceny.)

State v. Dobson (1840) 3 Harr. (Del.) 563: (indictment for larceny of bank notes. Held must be some proof of genuineness.)

State v. Tillery (1817) 1 Nott & M'Cord 9: (theft of bank note in violation of statute. Held that necessary to prove that it is a "true" note and that something is due thereon.)

31. (1848) 8 Penn. St. 260.

32. (1848) 8 Penn. St. l. c. 261.

33. (1848) 8 Penn. St. l. c. 264.

34. See 21 Law Series p. 13, note 29.

described personal property" - - - "to-wit, one railroad passenger ticket printed, issued and signed by the Oregon-Washington Railroad & Navigation Company, a private corporation, as evidence of the right of a passenger to transportation on the railroad of said company".³⁵ Judgment of conviction was affirmed in a liberal opinion. The facts were that the defendant abstracted the ticket from the rack in the company's office. He then stamped the ticket and was apprehended while trying to sell it. It will be observed, therefore, that the ticket had never been issued by the company and was not evidence of a chose in action. It would seem, in truth, to have been nothing more than "a piece of cardboard". It is believed that in England ordinarily the indictment would have charged the theft of "a piece of cardboard".³⁶ It is entirely possible to argue that the Oregon court thought the facts were within the Oregon statute. The opinion is not particularly clear but there is language to indicate that the conviction would have been sustained even though the statute had made no mention of a railroad ticket as subject of larceny.³⁷

35. *State v. Wilson* (1912) 63 Oregon 344, 127 Pac. 980. The Oregon statute provided: "If any person shall steal any goods or chattels or any Government note, bank note, promissory note, bill of exchange, bond or other thing in action, - - - or any railroad, railway, steamboat or steamship passenger ticket or other evidence of the right of a passenger to transportation which is the property of another, such person shall be deemed guilty of larceny."

36. See p. 18, 21 Law Series.

37. "Within the meaning of the case of *Jolly v. United States*, this railroad ticket, although yet in the possession of the company, would be the subject of larceny because it is comprehended within the general term of 'any goods or chattels' used in our statute." 1. c. 350.

The brief for defendant in *State v. McCulloch* quotes the decision as standing for the proposition that a railroad ticket was not the subject of larceny at common law. If it be assumed that the ticket has been issued by the carrier that would seem correct on principle. See, however, *Regina v. Boulton* (1849) Denison 508, 21 Law Series 18.

State v. Musgang (1892) 51 Minn. 556, 53 N. W. 874; (theft of "a book containing about 100 blank forms for passes" prepared

for use of employees on railroad. They had not been countersigned by the officer, without whose signature they were of no avail. Held, not larceny under statute providing that crime of larceny should apply to "a passage ticket completed and ready to be issued or delivered, although the same has never been issued or delivered by the maker thereof to any person as a purchaser or owner". Apparently no attempt to indict for theft of a "book" or so many "pieces of paper".)

Millner v. State (1885) 15 Lea 179: (railroad ticket subject of larceny under statute making it an offense to steal "any instrument or writing whereby any demand, right or obligation is created, ascertained, increased, extinguished or diminished, or any other valuable writing".) See *State v. Morgan* (1902) 109 Tenn. 157, 69 S. W. 970; *State v. Wilson* (1895) 95 Iowa 341, 64 N. W. 266; *State v. Brin* (1883) 30 Minn. 522, 16 N. W. 406.

McCarty v. State (1890) 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152: (information charged theft of "ninety-three railroad passenger tickets, of the aggregate value of one hundred and twenty dollars". Held invalid: "The value of each ticket should have been alleged, and the information should have shown that they were genuine, effective, railroad tickets, as an unstamped, undated, and unsigned railroad ticket is not the subject of larceny - - - - - Without these qualifications, the so-called railroad tickets had no more value than the intrinsic value of the paper on which they are printed, with the cost of preparing them. As this information did not charge the value of the paper, it could not be proven." See *Commonwealth v. Randall* (1875) 119 Mass. 107; *State v. Holmes* (1894) 9 Wash. 528, 37 Pac. 283.

Patrick v. State (1906) 50 Tex. Cr. Rep. 496, 14 Ann. Cas. 177: (indictment charged theft of "six railroad tickets reading from Texarkana, Texas, to Kansas City, said tickets of the value of fourteen and 65/100 dollars each, and of the aggregate value of eighty-seven and 90/100 dollars". Held defective: should have alleged (1) name of railroad; (2) that it was incorporated; and (3) that tickets had been issued, if such was the case. "It may be that the indictment was good for theft of any unissued railroad tickets, but it was certainly not good for railroad tickets that had been issued by the company and entitling the holder thereof to transportation." Considered as "bits of paper" the value alleged in the indictment could not have been sustained and that no doubt would be important in determining the degree of crime and the punishment.)

William Lawless³⁸ was indicted for larceny of "a certain paper writing, called and being a 'discharge' from the military service of the United States of the value of one hundred dollars". The discharge paper was not offered in evidence and it did not appear what were its contents or what was its value except that two witnesses spoke of it as a discharge from the military service of the United States. It was not argued that the written instrument was not the subject of larceny unless the jury should find that it had no value. The jury did not so find and "they were instructed that the paper was of no value unless the Commonwealth proved it to be of some value". There was no evidence that the particular paper had any peculiar value. The court contented itself with saying: "Its name, and its description in the indictment and by the evidence, sufficiently informed the jury what it was, and enabled them to judge whether it was or might be of value to the owner".³⁹ The defendant was held to have been properly convicted of larceny.

Whether a postage stamp is a written instrument depends upon what is included in the latter term. There is very little in written language upon the ordinary postage stamp but there is an implied contract on behalf of the federal government upon the sale of the stamp even though the obligation may be an imperfect one. In *Jolly v. United States*⁴⁰ it was held that postage stamps in the possession of government agents, which had not been is-

38. *Commonwealth v. Lawless* (1869) 103 Mass. 425.

39. *Commonwealth v. Lawless* (1869) 103 Mass. l. c. 431.

Commonwealth v. Brettun (1868) 100 Mass. 206, 97 Am. Dec. 95: (statute made promissory notes the subject of larceny. Indictment for larceny of 'one promissory note of the value of three hundred dollars, and one piece of paper of the value of three hundred dollars, of the goods and chattels of James H. Anthony' held good without further description.)

State v. Thatcher (1872) 35 N. J. L. 445 l. c. 452: (statutory terms "other valuable thing" included the act (thing) of signing as surety on a negotiable note of which defendant was maker, and on which prosecutor was fraudulently induced to sign as surety.)

40. (1898) 170 U. S. 402.

sued to customers, were the subject of theft under a statute punishing one who feloniously took away "any kind or description of personal property".⁴¹ The court was mindful of the fact that stamps like bank notes were incapable of being distinguished and "are not mere obligations but a species of valuable property in and of themselves the moment they are out of the possession of the Government". This represented a step in advance of the doctrine that bank notes were choses in action and therefore not subject of larceny.

It is also satisfying to know that the court was aware of the English doctrine permitting prosecution for theft of the paper or parchment on which an instrument was written.⁴²

It is a possible view that the postage stamps were public documents. If so, the decision is an authority against the view so strongly presented to the Criminal Court of Greene County, Missouri, that public documents are not subject of larceny.⁴³ As to

41. The court made this sufficient argument: "There is, while the stamps are in the possession of the Government, some intrinsic value in the stamps themselves as representatives of a certain amount of cost of material and labor, both of which have entered into the article in the process of manufacture entirely aside from any prospective value as stamps." 1. c. 406.
42. "Although at common law written instruments of any description were not the subject of larceny, as not being personal goods; that is, movables having an intrinsic value, yet although such instruments could not in strictness be stolen, the paper or parchment on which they were written might be, and prosecutions for petty thefts of this description frequently took place in England." 1. c. 407. The statement seems too broad. If the instrument was a chose in action theft could not be committed of the paper on which it was written.
43. "If the petitions are completed instruments, the charge must be laid for taking them as such, having absorbed the paper and such writings are not the subject of larceny at common law. If they are public documents, they are not the subject of larceny at common law and, furthermore, not the subject of private or personal ownership by Heilman." Brief for defendant (*State v. McCulloch*) p. 48.
"They are therefore public documents because devoted solely to a public purpose and are not the subject of larceny." Opinion by Judge Patterson, 21 Law Series, p. 7.

the argument in *State v. McCulloch* that the petitions were not "the subject of private or personal ownership by Heilman" it might be suggested that in *Jolly v. United States* the second count charged that the theft of the postage stamps was "from the possession of Thomas McClure, the postmaster". The conviction was upon both the first and second counts. Of course, it may be said that the stamps were the property of the United States. The reply is that larceny is a violation of possession and not of property.

II. MISSOURI AUTHORITIES

It would seem that from the very outset the Supreme Court of Missouri refused to accept the common law as to larceny of choses in action. In *State v. Newell*⁴⁴ there was an indictment for obtaining bills of exchange by false pretenses. The court in holding the indictment sufficient as to demurrer stated as follows:

"The words of the statute on which this indictment seems to be predicated, are: 'If any person or persons, knowingly and designedly, by any false pretense or pretenses, obtain from any other person or persons, moneys, goods, or merchandise, or effects whatever, with intent to cheat or defraud such person or persons of the same, he shall, on conviction,' etc. The first question is, will the word 'effects' embrace a bill of exchange? This appears to be a question of construction. The design of the Legislature seems to have been to embrace every kind of case; they, therefore, after mentioning all sorts of personal things in possession, say, or effects whatever; no doubt intending to embrace something more than money, goods, or merchandise. By name, effects will embrace lands, tenements, etc. Effects in law must mean everything which is subject to the laws of property and ownership, whether real or personal; and of the personalty whether of possession or in action. A bill of exchange is not money, but is a security for money, because it contains the proof that money is due, and a promise to pay it. It is also a species of merchandise.

44. (1822) 1 Mo. 249.

or rather answers the end of money, in passing like money. It is effects, within the meaning of the statute; and this Court have already decided, that promissory notes are effects; (see the case of the Bank of Missouri v. Douglass.) But it is said, these bills are not effects, till they have passed out of the hands of the drawer. My opinion is, that if A, by false pretenses, cheats B, into making a bill of exchange, to be delivered to him, and to be used by him, that this is cheating B of effects, or means of living. The statute was made to prevent the wicked and cunning part of mankind from preying on the less wicked and cunning; to protect the unwary; to be the guardian of the ignorant and unwise. The end and the means by which the fraud is effected, is perfectly immaterial. Experience has shown that men grow cunning in new devices as speedily as law can be made to prohibit the old. The statute, therefore, uses general words, and prohibits the act to be done, without regarding the means by which it is effected."

The language of the court is rather remarkable and certainly displayed no tendency to ignore the needs of society.⁴⁵ Three points should be noticed. The decision makes no mention of any statute making choses in action the subject of larceny or false pretenses. There seems to be a desire to disregard the common law rule. In the second place it seems doubtful whether if it be assumed that a bill of exchange is an "effect" within the statute the same should be held as to a bill of exchange, the drawer of which is the prosecutor. In such a case it would seem that the bill is not valid and that all the accused secures is a piece of paper. If the accused furnished the paper it would not seem that he obtained any property by securing the signature of the prosecutor. The third point is that the Supreme Court had a broad and liberal attitude in construing the statute. The word "effects" was given a wide meaning and there was not the slightest disposition to apply the rule of *ejusdem generis*

45. "Here, by false pretenses, a right or chose in action has been obtained; it is an effect, and the transaction is, in an eminent degree, the object of criminal law." 1 Mo. l. c. 250.

so as to hold that "effects" was a general term following the particular words "moneys, goods, or merchandise" and therefore to be limited in its meaning.

It has been pointed out that the common law rule as to choses in action logically meant that a bank-note was not subject matter of larceny. Some decisions went that far. The Supreme Court of Missouri apparently had no faith in such a notion. In *McDonald v. State* is the following:

"Third. The thirty-second section of the third article of the act concerning crimes and punishments, is in these words: 'Every person who shall steal, take and carry away any money or personal property of another, etc., shall be deemed guilty of larceny', etc. The indictment charges that he did steal, take and carry away a bank-note, for the payment of ten dollars, of the value of five dollars. A bank note is personal property; it is personal effects. In *State v. Newell*, 1 Mo. R. 248, a bill of exchange is decided to be personal property or effects."⁴⁶

In *State v. Logan*⁴⁷ the Supreme Court in passing on the sufficiency of an indictment argued in this fashion: "We cannot conceive how it is necessary that the title of the book should be given. The substance of the offense is stealing a book of the value of three dollars. It cannot be material, whether the book was printed, written or blank. If this book was in blank, it could have no title page, yet it would be the subject of larceny." Probably no one would deny the soundness of the argument. The indictment in *State v. McCulloch* charged the taking of "three hundred and sixty-nine (369) paper pamphlets each of which pamphlets contained eight (8) leaves." The difference between a book and a pamphlet for the present purposes seems unreal.

These seem to be the precedents in Missouri aside from the decisions depending on statutes changing the common law

46. *McDonald v. State* (1843) 8 Mo. 283 l. c. 285. Compare *U. S. v. Moulton* Federal Case 15827 and *U. S. v. Davis* (1829) Federal Case 14930.

47. (1825) 1 Mo. 532.

rule. The authority is meagre but so far as it goes it exhibits a wholesome tendency and one that lends no sanction to the decision rendered in the Criminal Court of Greene County, Missouri.

There is another proposition that was urged by the attorneys for defendant in *State v. McCulloch* and was adopted, apparently, by Judge Patterson in rendering his decision: "Under section 4927⁴⁸ of our statutes only such written instruments as affect pecuniary obligations or such written instruments as affect title to property are personal property and, as such property, the subject of larceny."⁴⁹ Section 4927 reads as follows:

"The term 'personal property', as used in this law,⁵⁰ shall be construed to mean goods, chattels, effects, evidences of rights in action, and all written instruments by which any pecuniary obligation, or any right or title to property, real or personal, shall be created, acknowledged, assigned, transferred, increased, defeated, discharged or diminished."⁵¹

The argument was that the referendum petitions were not evidences of rights in action nor the sort of written instruments mentioned in the statute. That much must be granted. It does not follow, however, that there are no other written instruments except those mentioned. The inference is to the contrary and any fair definition of the term "written instrument" would seem to confirm the inference. The attorneys for defendant gave an acceptable definition in stating in effect that a written instrument is a piece of paper containing writing.⁵² Upon the basis of this definition it becomes apparent that Section 4927 has not included all written instruments. No doubt, the court rendering the de-

48. R. S. Mo. 1909.

49. See p. 7, 21 Law Series.

50. The phrase "in this law" is assumed to refer to the chapter dealing with crimes and punishment.

51. Now Section 3716, R. S. Mo., 1919.

52. Reply brief for defendant, p. 18. It is proper to suggest that cloth, parchment, metal or stone would do as well as paper. The symbols may be printed, typewritten, written, carved,—in fact any known method that is reasonably permanent should be sufficient.

cision in *State v. McCulloch* would have admitted as much as a premise for a conclusion that since no written instrument was subject of larceny at common law only such as are included within Section 4927 are subject of larceny in Missouri. It has been the purpose, however, of all that has been heretofore written to demonstrate that the authorities are overwhelmingly against the view that no written instrument was subject matter for larceny at common law if the indictment was properly drawn.

It should be observed, also, that Section 4927 includes "goods, chattels, effects" within the meaning of the term personal property. Missouri decisions, quoted above, held a bill of exchange and a bank note to be effects. The same would seem to be true of any other written instrument, including a referendum petition.

The apparent purpose of Section 4927 was to make certain sorts of written instruments—choses in action and instruments "savouring" of realty—subject of larceny by classifying them as personal property. To hold that the legislature in doing this succeeded in depriving all other written instruments of the protection of the criminal law would be a strange construction. Surely, no one would deny that the purpose of legislation dealing within the subject matter of larceny has been to liberalize the common law conceptions. The construction given to Section 4927 by the court in question was restrictive and resulted (if the major premise of this article is correct) in withdrawing written instruments protected by common law from any security of the criminal law of Missouri.

Section 4927, however, is not the last word in the determination of the decision under review. The indictment was based upon Sections 4250 and 4528.⁵³ The former defined the crime of burglary in the second degree as breaking into certain enclosures in which any "goods, wares, merchandise or other valuable thing" is kept or deposited with intent to steal or commit a felony. The latter section provides the procedure in case

53. R. S. Mo., 1909; now Sections 3297 and 3305 R. S. Mo., 1919.

"any person in committing burglary shall also commit a larceny". The term "larceny" is not defined in that section.

It is worthy of particular attention that the words "personal property" do not occur in Section 4520. How is it possible, then, for Section 4927 to have any application? The only question that seems to arise is whether a referendum petition is a valuable thing. Honest reasoning compels an affirmative answer. There is no occasion for extending the fictitious reasoning of Coke's time with reference to choses in action.

To ascertain what is meant by the term "larceny" as used in Section 4528 it seems necessary to keep in mind the accepted common law and refer to Sections 4535 and 4548.⁵⁴ Section 4535 specifies the subject matter of grand larceny as "any money, goods, rights in action, or other personal property or valuable thing whatsoever" of the value of thirty dollars or more.⁵⁵ Section 4548 specifies the subject matter of petit larceny as "any money or personal property or effects of another under the value of thirty dollars". It is to be noticed that the two sections differ in the terms used even though there seems to be no occasion for a difference in specifying the subject matter. It is a fair illustration of the proposition that statutes are seldom symmetrical or even self sufficient.

Conceding that Section 4927 (under whatever interpretation may be decided upon) controls the words "personal property" as they appear in both sections what is to be said of the terms "valuable thing whatsoever" and "effects"?⁵⁶

Labor and material go into referendum petitions the same as other written instruments. They represent a certain expenditure of society's productive forces and sound judgment would

54. R. S. Mo., 1909; now Sections 3312 and 3325, R. S. Mo., 1919.

55. Certain animate objects, regardless of value, are also specified.

56. Since the indictment charged the value to be less than thirty dollars it would seem that Section 4548 rather than 4535 would control. But it seems preferable to hold that the decisive factor would be the understanding at common law as to subjects of larceny and in addition any subjects which may have been added by statute.

seem to compel an admission that they are either valuable things or effects even if it be admitted that they are not personal property within the meaning of Section 4927. If this is true then the taking of referendum petitions may be larceny under Sections 4535 and 4548 regardless of the interpretation to be given Section 4927.

Counsel for defendant⁵⁷ in *State v. McCulloch* suggested that the rule of *ejusdem generis* applied and that the words "valuable thing whatsoever" should be restricted by interpretation to apply only to things of the same general class as those included within the preceding words "personal property" as defined by Section 4927.

It is doubtful whether Section 4535 is an apt statute for the application of the rule. The important words in the section are "money, goods, rights in action, or other personal property or valuable thing whatsoever". This is not a collection of specific or particular terms followed by a generic term. Other words among those quoted seem as general as "valuable thing".

Even if it be conceded that the rule of *ejusdem generis* should be applied it must be remembered that the rule is at most only a guide to the legislative intent.⁵⁸ The rule is not an end within itself. Surely, it is not to be believed that the Missouri legislature intended by the adoption of Section 4535 to eliminate from the subject matter of larceny anything that was larceny at common law.

Finally, it is to be observed that the argument by defendant's counsel takes no heed of Section 4548, defining petit larceny. Furthermore, the whole argument as to the application of the rule requires a conviction that Section 4927 has removed from the protection of the criminal law of Missouri those written instruments which (it is submitted) were subject to larceny at common law.

57. Brief for defendant, p. 54.

58. Sutherland on Statutory Construction, Section 279.

III. CONCLUSION

The decision under review has attracted unusual attention in view of the fact that it was rendered by a trial court. It was harshly criticised in a learned article which appeared in the *Central Law Journal*.⁵⁹ Some of the more pertinent paragraphs should be copied here.

"There are three clear fundamental errors in this opinion. First, it does not correctly state the common law rule; secondly, it does not fairly construe the state statute; thirdly, it does not accurately define the term 'property'. In the first place the common law did not exclude all 'written instruments' as subjects of larceny. In the second place the Missouri statute does not exempt certain property from this common law rule, but provides generally that persons may be convicted of larceny who steal 'any money, goods or other personal property or valuable thing whatsoever'. In the third place in seeking to show that referendum petitions are not 'personal property', within the terms of this statute, the court improperly confines the meaning of this term to absolute interests in chattels, when it obviously includes anything in which one may have any right of user whatever, whether absolute or qualified or whether it has a market value or a value based only on a particular use of it by the possessor thereof.

"We have already referred to the old case in the Year Books which held that stealing the title deeds to property was not larceny. Lord Coke, by a process of technical refinements, applied this principle to all evidences of choses in action. The common-law rule, however, did not go any further. May on Criminal Law, Sec. 272; Stephen's History of the Criminal Law (3rd Ed.), p. 143. The reason for this rule as stated by Coke and the early common law judges was that where a written instrument was merely the evidence of an obligation, a theft of the paper did not affect the obligation which still existed independent of the writing, and therefore nothing of value was taken. That reason is not even a decent reason for the absurd rule which

59. Vol. 91, p. 241.

it seeks to sustain; it certainly is no reason whatever to sustain the rule when applied to written instruments which do not represent pecuniary obligations and whose value inheres in the paper itself, and what is written thereon. Therefore, in the absence of statutes, all written instruments other than evidences of obligations and title may be the subjects of larceny.

"But the Missouri statute, as quoted above, is as broad as the statute in any other state where the effort has been made to abrogate this absurd rule of the common law. But the court refuses to take even this opportunity to escape the effect of a rule which he believed existed at the common law. It would seem that any judge should jump at the chance to relieve the jurisprudence of his state from the burden of an inherited rule of law which is ridiculous enough to make a Hottentot laugh. * * * * *

"The trial court's argument to show that a referendum petition was not personal 'property' under the Missouri statute is superficial and illogical. Anything is my property in which I have a lawful right of user. The term 'property' is nothing but the bundle of rights which the law declares an individual may have or enjoy in a thing. A sheet of paper is a thing. It has dimensions and it has value. Even if the writing thereon makes it merely the evidence of a chose in action, as a note, at common law the writing could be and frequently was disregarded and the thief prosecuted for petit larceny for stealing a 'scrap of paper'. 2 Russell, Crimes, 74-80.

"Nor need the value of the thing be 'appreciable', as the court alleges, if by that is meant a market value. The thing may be a Chinese laundry ticket and be worthless to everyone but a Chinaman and yet be valuable to him * * * * *

"Nor had the referendum petitions in the principal case become public records; they were still the property of the circulators until they were deposited with the proper authorities and from that time only did they exert their influence as legislative documents. No property ceases to be mine until I have parted

with it. A deed is not a deed until it is delivered. A note is not a note until it is negotiated. A declaration or answer, drawn up and signed does not become a pleading until filed with the clerk. In all these cases the owner of the writing retains his ownership or right of user in the paper or document until he parts with it.

"It is a matter of regret to every lawyer that cases involving wrongs to society must ride off to defeat on mere technicalities even when properly understood, but it is little short of a catastrophe when judges go out of their way to give effect to technical objections that have no relevancy whatever to the case.

"English lawyers often marvel at the rigidity with which our courts adhere to the letter of the decisions of an ancient and barbarous age from which their courts have long since departed. The only explanation of this tendency is that our courts fail to exercise any independent judgment of their own, but are too ready to take some other judge's opinion or some superficial text writer's generalization as the law without any inquiry either as to the soundness of the original rule or its exact limitations in view of the facts of the particular case or the state of the law or of society at the time the decision was rendered."

Nevertheless, the decision has found a defender in the *St. Louis Law Review*.⁶⁰ Therein the writer views Judge Patterson as courageously refusing to indulge in judicial legislation. It seems necessary, however, to point out that the author was in error in saying that the petitions "were in the custody of one of the Election Commissioners".⁶¹ Moreover, no authority is cited for the author's conclusions except Sections 4520 and 4927.

Furthermore, there need be no apology in insisting that courts do not devitalize our substantive law. Such seems to have been the fear of W. L. Sturdevant who protested in *Journal Issued by American Bar Association*, in this fashion:⁶²

"It is not our purpose here to discuss the merits of the

60. Vol. 6, p. 54.

61. 21 Law Series, p. 6.

62. Vol. VI, p. 113.

legal question involved in this prosecution; but we think it would not be out of place to suggest that this is but one more example of a judicial proceeding that has caused people, not only by thousands, but by hundreds of thousands, to express, in their various ways, their utter contempt for the law and its administration. It is such judicial fiascos that shock the common sense of the masses of people and sow the seeds of anarchy; and this is equally true whether due to defects in the law itself or in its administration. The average man cannot, will not, understand, how the perpetration of a great wrong, affecting a public or a private interest, can be accomplished without a violation of the law."

Kenneth C. Sears

University of Missouri, School of Law.

LAW SERIES

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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—Mr. Justice Holmes, *Collected Legal Essays*, p. 269.

NOTES ON RECENT MISSOURI CASES

CONFLICT OF LAWS—TITLE TO CHATTELS UNDER CONDITIONAL SALE MADE OUTSIDE OF STATE. *Jerome P. Parker-Harris Co. v. Stevens*.¹ Plaintiff sold an automobile conditionally to one Martin in Tennessee, the contract of sale providing that title should remain in plaintiff until the agreed purchase price was paid, but Martin was given possession of the car. It was further stipulated in the agreement that Martin should not take the car out of Tennessee, without plaintiff's consent in writing, until the purchase price was paid, and it was agreed that if Martin did so remove it that plaintiff could proceed under the contract as if Martin was in default. After the sale, Martin, without plaintiff's consent, removed the car to Missouri, and there dis-

1. (1920) 224 S. W. 1036.

posed of it to one Stephens, who was a *bona fide* purchaser for value. The conditional sale was valid where made, and plaintiff's title under Tennessee law would have been good as against Stephens² although the conditional bill of sale was neither recorded or filed in Tennessee, such a proceeding not being required there by law. Both of the parties to the conditional sale were domiciled in Tennessee.

Plaintiff, having discovered that the car was in Missouri, brought this action against defendant, who claimed under Martin, to replevy the car, claiming that his title under the Tennessee conditional sale was good, and prevailed in Missouri as against that of defendant. On the other hand, defendant contended that plaintiff's title was not good in Missouri because Missouri had a settled policy against the sustention of secret liens and titles against innocent purchasers for value, where the property with respect to which the lien is claimed has been surrendered and the possessor clothed with apparent ownership. This argument apparently was based on the fact that the Missouri statutes³ required the recording of all chattel mortgages and conditional sales of chattels given within the state. It was easy to argue from this that the statutes showed a policy against all unrecorded transactions of this kind and to contend that plaintiff did not have any rights to the automobile within Missouri, which would be superior to defendant's. The Springfield Court of Appeals, however, decided for plaintiff, holding that as a matter of comity plaintiff's title should be sustained. The court said that where the sale is valid where made, and the vendor does not assent to the chattel's being removed to another jurisdiction the vendor's title should be protected everywhere, unless there was a policy against the vendor's rights at some subsequent situs of the chattel. The court concluded that there was no such policy in Missouri, because there was no express statute dealing with such matters, and because the recording statutes of Missouri only purported to deal with local conditional sales. It was therefore stated that the law of the *place* where the sale was made would govern plaintiff's rights and title.

According to early continental writers on conflict of laws, questions relating to title to personal property were referred to, and determined by the law of the domicile of the owner.⁴ There are *dicta* to this effect in some of the English cases⁵ and the doctrine has had the support of some of the earlier cases in this country.⁶ In the case of *Cam-*

2. *Grange Warehouse Association v. Owen* (1888) 86 Tenn. 355, 7 S. W. 457.

3. Sect. 2889 R. S. Mo. 1909. Sect. 2284 R. S. Mo. 1919.

4. Pothier, *Des Choses* 2 No. 3; Witzendorf, *De Stat.* 15 No. 11.

5. *Sill v. Worsdick* 1 H. Bl. 1. c. 690;

Doe. d. Birswistle v. Vardill 5 Barn & C. 438.

6. *Edgerly v. Bush* (1880) 81 N. Y. 203. For a Canadian decision applying the rule, see *Bank v. Corcoran*, 6 Ontario 527.

mell v. Sewell,⁷ however, the Court of Exchequer Chamber held that title to goods, the property of a British owner, sold in Norway, was to be governed by the laws of the latter country. It thus applied the law of the situs of the goods, which in this case happened to be identical with the law of the place of the contract of sale. The rule that the law of the situs shall control questions of title has now become generally recognized in England,⁸ in this country,⁹ and on the Continent.¹⁰ It has the support of most modern jurists.¹¹ The change in the law seems to be due to the rise of new economic conditions.¹² During the mediaeval period, the importance of chattels in the life of a country was practically negligible, but since the industrial revolution, the role which they play in national life has become of great importance, and their control by the state in which they are located is imperative; hence, the change in the rule of law, and the assertion of the principle that matters of title to chattels must be regulated by the law of their situs.

A sale is a transaction whereby title to chattels is transferred from one person to another for a money consideration.¹³ By it the vendee steps into the shoes of the vendor, and is enabled to assume the same position towards the chattel which the vendor, whom he succeeds has occupied.¹⁴ This passage of title, and the resultant rights as they concern not only the parties themselves, but also the state in which the goods are located are subject to the regulation of that state. There is a further theoretical consideration, which would force us of necessity to the same conclusion, namely, rights can arise only out of the application of law to certain states of facts, and the law to be applied must be that in force where the facts exist.¹⁵ There must be a coincidence of law, which gives the right, and facts to which the law attaches. Now the essential facts out of which the rights of vendor and vendee arise

7. (1859) 5 Hurl & N. 728, 2 Law Times 799. An earlier English decision which seems to follow this rule is *Inglis v. Usherwood* (1801) 1 East 515.

8. *Alcock v. Smith* (1892) 1 Ch. 228; *Castrique v. Imrie*, (1909) 29 L. J. C. P. 350, 5 E. R. C. 899; *Embricos v. Anglo Austrian Bank* (1904) 2 K. B. 870; *Halsbury's Laws of England* 213.

9. *Oliver v. Townes* (1824) 2 Mart. (n. s.), (La.) 93; *Green v. Van Burskirk* (1868) 7 Wall 139, 19 L. Ed. 109, *Lorenzen's Cases on Conflict of Laws* 292; *Schmidt v. Perkins* (1907) 67 Atl. 77, 11 L. R. A. (N. S.) 1007 (N. J.). A Canadian case is *Stave Co. v. Still*, 12 Ontario 557. It seems to reverse the

Corcoran case *supra*, note 6..

10. See authorities cited in *Lorenzen's Cases on Conflict of Laws*, p. 292, note.

11. Wharton *Conflict of Laws*, 3 ed. Vol. I, p. 674; Von Bar, *Theorie und praxis des internationalen privatrechts*. (Gillispie's Translation) 2 ed. 231.

12. Wharton *Conflict of Laws*, 3 ed. Vol. I, p. 615.

13. 35 Cyc 25; Williston's *Sales*, Sect. 2.

14. Holmes, *The Common Law*, Chap. X.

15. Huberus, *Præ. Juris Romani et hodierni*, Vol. II, lib. I, tit. 3., cited 3 Dall. l. c. 370 note.

as to property in the goods exist only at the situs of the goods, therefore, only the law there in force is the law which can create these rights. Accordingly the law of the situs of the chattels must govern as to property rights growing out of a sale.^{15a}

It has been attempted to show that the matter of title to chattels, in its inception, according to modern authority, is one that is controlled by the law of the situs of the chattel at the time of the transaction, which it is claimed results in the passage of title. The difficult question, however, is to what extent will a title, valid by the law of that situs, be recognized and sustained if the chattel is removed by another jurisdiction? Suppose that A gets a good title in state 1 where the chattel then was; suppose that the chattel is removed to state 2; will A's title be valid there too, and will A be able to claim the chattel there? So far as principles of conflict of laws are concerned, A's title, outside of state 1, would not of necessity be good. The law of state 1 is not present in state 2 except as a fact, if proved, and has no force or effect there to give A any rights with respect to any chattels. This being the case, A's rights in state 2 will depend on the extent to which that state desires to give effect to the laws of another state and to recognize a foreign created title. As a general rule, one state is disposed to recognize a foreign title within its boundaries, and to sustain and sanction it. This is a matter of common courtesy due from one state to another; a matter of comity. But it is conceivable that state 2 might not be willing to sustain A's title. It might be that giving recognition to A's foreign title would be contrary to the policies of state 2, and if this were the case, A should have no rights to the chattel there, because comity would not compel state 2 to extend recognition to A's title.¹⁶ Surely no state should or would recognize a foreign title if its policy deemed such a right against its best interests. It would seem then, that the question in all this class of cases is, does the foreign right, which is asserted, militate against the best interests of the state? Is there a policy against the sustention of such a title? If there is such a policy, the title ought not to be sanctioned, but if there is not, it should be.

Assuming that the title of a conditional vendor is good by the law of the situs of the chattel at the time that the sale occurs, that title might be questioned at a new and later situs of the chattel, by a *bona*

15a. The situation in the case of a conditional sale is essentially the same. The questions are, when does the vendee get full and complete title? What interests does the vendor retain, pending the performance of the condition? As against whom is the vendor's interest, if he has any, good? If the law of the

situs of a chattel governs in the case of a sale, it must govern also in the case of a conditional sale.

16. *Marshall v. Sherman* (1895) 148 N. Y. 24, 42 N. E. 419; *Flag v. Baldwin* (1884) 38 N. J. Eq. 219, 48 Am. Rep. 308.

fide purchaser under one of the following general states of facts, (1) where there is a statute at the new situs, declaring the title of such foreign vendor to be void, or (2) where there is a statute at the new situs, which does not on its face purport to deal with the rights of a foreign vendor, but merely provides that the rights of a vendor under a similar bill of conditional sale, executed within the state, shall be void as against a purchaser for value unless the bill of condition sale is recorded. It has been said that under the first state of facts assumed the vendor's title would not prevail because the statute precludes its recognition.¹⁷

Where there is a statute at the new situs, regulating locally executed conditional sales, making them void as against a *bona fide* purchaser unless the bill of sale is recorded, it would be possible to hold that the statute has no bearing on the rights of a vendor under a foreign sale. It could be said that, as the statute purports to regulate local sales, sales made elsewhere than within the state were not affected by it. There is authority to this effect,¹⁸ and where this is the rule, the rights of the foreign vendor would be good as against everyone, just as they would be at the original situs of the goods, where the rights were acquired. On the other hand, it might be said that the statute, even though it did not attempt to regulate titles under foreign sales, nevertheless showed a

17. *Hervey v. Locomotive Works* (1876) 93 U. S. 664, 23 L. Ed. 1103, *Lorenzen's Cases Conflict of Laws* 307. But *quaere* even in such case is it proper for the state to thus divest the title to a chattel present within its boundary without the consent of its owner. If it has jurisdiction of the chattel then clearly it may do what it will with the title. It was said by the Supreme Court of the United States in *Rose v. Hunsly* 4 Cranch 241, cited II *Mores Dig. Inter. Law* c. 7. that: "Whatever may be the municipal law under which a tribunal acts if it exercise a jurisdiction which its sovereign is not allowed by the law of nations to confer its decrees must be disregarded out of the dominions of that sovereign." Thus the courts of a sovereign may not exercise jurisdiction over the persons of foreign ambassadors, etc. IV *Moore Dig.* p. 622. Nor should the courts of a state get jurisdiction of the person of one present in that state because of fraud or violence, etc. May it not well be that international law imposes a like restriction on the obtaining

of jurisdiction over chattels where they are present in the state without the consent of the owner? It is submitted that this is the proper explanation of the decision in *Edgerley v. Bush*, *supra*, note 6. Suppose that a plaintiff forcefully seizes a foreign defendant and brings him into the state and there serves him with a summons. No court ought to uphold jurisdiction thus gained even if the law of the forum issuing the summons permitted such procedure. Is not the analogy good in the case of chattels wrongfully brought into the territory of a sovereign? See 24 *Harv. Law Rev.* 567.

18. *Sharpa'd v. Hynes* (1900) 104 Fed. 499, *Lorenzen's Cases Conflict of Laws*, 203; *Drew v. Smith* (1871) 59 Me. 393, 22 Atl. 250; *Wooley v. Geneva Wagon Co.* (1896) 59 N. J. L. 278, 35 Atl. 787; *Studebaker Bros. Co. v. Mann* (1905) 18 Wyo. 358, 80 Pac. 151; *Dupont Powder Co. v. Jones Bros.* (1912) 200 Fed. 638; *Swain v. Schild* (1917) 117 N. E. 933. (Ind. App.)

policy against secret titles of conditional vendors, no matter where the title was acquired, and under such a holding, the title of a foreign vendor would not be treated as valid, but would be dealt with in the same way as the title of a domestic vendor under an unrecorded bill of conditional sale.

It is undoubtedly true that the statute, above referred to, does show a policy at the new situs against secret titles, and such policy might well be applied to all titles, domestic and foreign, if the application of the policy would not work too great an injustice to the vendor. If the foreign vendor, therefore, has assented to the removal of the chattel, covered by the sale, to the new situs, it would be proper to hold that the rights of an innocent purchaser of the chattel should be superior to those of the vendor. The vendor by assenting to the removal of the chattel, and its presence at the new situs, has in fact submitted the chattel to the jurisdiction of the laws of that situs. This being the case, the only logical holding would be that the vendor's title under the assumed facts was void. It would be altogether improper to allow a vendor, just because he has a foreign title, to escape the effect of policies in force at the new situs, he having himself assented to the placing of the chattel at this situs.

Suppose, however, that the vendor has not consented to the removal of the chattel to the new situs; ought the decision under these facts to be that his title is gone just because of the policy against secret liens? It would seem that, in spite of the policy at the new situs, the vendor's title ought to be protected, and held valid even as against a *bona fide* purchaser, because it would be clearly unjust to deprive a man of his property, when it has been removed against his will from a state where he had placed it. He has not in any way submitted the chattel to the jurisdiction of the new situs, nor is he responsible for its presence at the new situs. It is one thing to say if an owner send a chattel into a state that it shall be subject to the jurisdiction and policies of that state, but quite another that the chattel shall be so subject when it has come within the state illegally and against the owner's will. It would be unjust and against public policy to hold to this result under the last assumption. So when the chattel is at the new situs with the vendor's assent, the courts would for the most part, hold that the vendor's title was void,¹⁹ but where it was at the new situs without the vendor's consent that it was good,²⁰ and such decisions are sound.

19. In *Boyer v. Knowlton Co.* (1911) 97 N. E. 137 there is a clear decision that the *lex situs* and not the *lex contractus* governs. See also *Southern Hardware Co. v. Clark* (1913) 119 C. C. A.

339, 201 Fed. 1. *Contra*, applying *lex contractus*, *Emerson Co. v. Procter* (1903) 48 Atl. 849 (Me.).

20. See *Edgerly v. Bush*, *supra*, note 6, and cases cited under note 18. *Con-*

It has been held that where the retention of title is void by the law of the situs where the goods were at the time of the sale, but valid by the law of a state to which they were later removed the latter law would apply.²¹ Such a rule on principle seems to be wrong. The law which raised the rights under the sale was the law of the situs of the goods at that time; it was the only law which had jurisdiction over the matter of title. Limits might be placed on the recognition of a title good by the law of the original situs of the goods by the law of another and later situs, but the law of a later situs could not increase the rights originally gotten by the vendor. The law of such later situs had no application to the transaction by which the vendor's title, if he got any, was created.

The case under review is the only Missouri decision in which the question of the law governing foreign conditional sales has been raised. There have been, however, some cases involving the general question of foreign titles to chattels, which throw some light on the problem here under consideration. In the first case of the kind decided in the Missouri courts, *Smith v. Hutchinson*,²² the Supreme Court held that title under a sale where possession was retained by the vendor was to be governed by the law of the state where the sale was made, and the property located at the time of the sale, rather than by the law of the state into which the goods were subsequently taken and the action brought. The court did not have to choose between the law of the domicile, the place of contract, or the situs. The later cases have all been mortgage cases. In *Feurt v. Powell*²³ and *Bank v. Metcalf*²⁴ the courts held the validity of a mortgage depended on the law of the place where the goods were located and the contract made rather than on the law of the forum, but in neither case was there an actual decision against the *lex domicilii* or *lex contractus*, and in favor of the *lex situs*. In *Bank v. Morris*²⁵ the court expressly applied the law of the situs. *Tower Brothers Co. v. Hamilton*²⁶ construed the validity of a mortgage lien and the recording of the mortgage by applying the law of this state,

tra: Cunningham v. Surtain (1895) 96 Ga. 849, 23 S. E. 420, which cites and follows the early line of cases applying the *lex domicilii* in questions of title to chattels; *Willys Overland Co. v. Chapman* (1919) (Tex.) 206 S. W. 978; *Judy v. Evans* (1903) 109 Ill. App. 134; *Chambers v. Consolidated Garage Co.* (1919) (Tex.) 210 S. W. 978. These last cases seem to go on the ground that the statutes evidence a policy which ap-

plies as well to foreign as to domestic vendors.

21. *Weinstein v. Fryer* (1890) 93 Atl. 257, 9 So. 856. *Contra: Davis v. Os-good* (1899) 54 N. H. 227, 44 Atl. 432.

22. (1861) 30 Mo. 380.

23. (1876) 62 Mo. 524.

24. (1888) 29 Mo. App. 384.

25. (1893) 114 Mo. 255, 21 S. W. 511.

26. (1904) 77 S. W. 1081. Compare *Fessenden v. Taft* (1889) 65 N. H. 39.

it being the situs of the goods, although the contract was made in Kansas. The validity of the mortgage debt as regards the rate of interest charged was properly tested by the *lex contractus*, this matter having nothing to do with the question of the title of the mortgagee. The rule mentioned above, that if the goods sold conditionally are brought into the state of the forum with the consent of the vendor, the vendor loses any rights which he had by the law of the goods' former situs, but which are denied by the policy of the law of the forum gains support from the analogous case (dealing with the rights of a chattel mortgagee) of *Geiser Mfg. Co. v. Todd*.²⁷ It was held in that case that the mortgagee lost his lien, when the goods were brought into this state with his assent as against a person in the position of an innocent purchaser for value.

In the instant case, the court was not forced by the facts before them to decide whether the domiciliary law of the parties, the law of the place of the contract, or the law of the situs at the time of the conditional sale, governed the rights of plaintiff. All of these places were identical, hence the law of all was the same. There is *dicta* in the case to the effect that the law of the place of the contract should govern plaintiff's rights. In the light of the foregoing discussion, it is believed that this suggestion is unsound, and that the law of the situs of the chattels at the time of the sale is the proper law to apply in determining this question. But the actual decision in the case is correct for the reason that the situs of the chattel at that time and the place of the contract were one and the same.

B. E.

TORTS—VICIOUS DOGS—LEGAL CAUSE—LIABILITY AT PERIL. *Clinkenbeard v. Reinert*.¹ Parents brought an action for the death of their minor child caused by rabies received from wounds inflicted by defendant's rabid dog. The Supreme Court of Missouri held defendant liable, even though defendant did not know and was not chargeable with knowledge of the rabid condition of the dog. The owner knew or should have known that the dog was vicious and disposed to bite mankind. The court states that the gist of the first count of the action was the keeping of the dog after knowledge of its vicious propensities, and the owner being under a duty to kill the dog was liable for an injury inflicted by the dog without proof of negligence. Woodson, J., dissented in part.

The petition also contained a second count basing a cause of action upon a city ordinance prohibiting the keeping of vicious dogs. The

27. (1918) 204 S. W. 287.

1. (1920) 235 S. W. 667.

court were unanimous upon the plaintiff's right to recover under this count. The particular set of facts appears to present a case of first impression although the principle involved is by no means new. The result obtained may be desirable but the reasoning employed, it is submitted, may be questioned. At common law the rule defining the liability of the keepers of dogs known to be vicious is stated to be: "But if one knowingly keeps a vicious or dangerous animal, which is accustomed to attack and injure mankind, he is *prima facie* liable for injuries done by it, without proof of negligence as to the manner of keeping it. The negligence on which the liability is founded is keeping such an animal with knowledge of its propensities. Thus it is evident that as respects the liability of the owner, there is no distinction between the case of an animal which breaks through the tameness of its nature, and is fierce, and is known by its owners to be so, and one which is *ferae naturae*. But while the ancient rule, as generally found stated, is that the gist of an action for injuries inflicted by a ferocious animal is keeping it, with knowledge of its vicious propensities, negligence or the want of negligence being deemed immaterial, to some courts a more accurate statement of the true principle governing the owner's legal responsibility seems to be that the gist of the action is the failure to keep such animals securely."^{1a}

In the principal case the court has this to say on this point: "In the instant case the owners were long before the incident which brought about the horrible and untimely death of this little girl, fully advised of the vicious propensities of the dog. When so advised it became their absolute duty, for the protection of the public, either to kill or safely restrain their dog. A failure to do one or the other rendered them liable. The trend of our Court of Appeals is to require the killing of the vicious dog rather than his restraint. Much authority elsewhere is to the same effect, and we are disposed to and do adopt the more rigid rule of our Court of Appeals."² This view is well supported by the cases in this country and in England.³ However, the authorities are by no means harmonious. Judge Cooley has this to say in his work on Torts:⁴ "In *May v. Burdett*,⁵ an action for an injury by the bite of a monkey was sustained, though no negligence was charged in the declaration. In Connecticut, this case has been cited as authority to the point that the keeping of a vicious dog, after notice of his evil disposition, is wrongful and at

1a. 1 R. C. L. p. 1089. To like effect. 3 C. J. 97; 2 Am. & Eng. Ency. of Law (2nd Ed.) 366.

2. The court cites *Speckmann v. Krieg* (1899) 79 Mo. App. 376; *O'Neill v. Blase* (1902) 94 Mo. App. 648, 68 S. W. 764; *Merritt v. Mitchell* (1909) 135

Mo. App. 176, 115 S. W. 1066.

3. The cases are collected in 3 C. J. 97.

4. Cooley on Torts, 2d. Ed. p. 411.

5. (1846) 9 Q. B. (N. S.) 101, 3 Eng. Ruling Cas. 108.

the peril of the owner, 'and, therefore *prima facie* the owner is liable to any person injured by such a dog, without any averment or proof of negligence in securing, or taking care of it.' But admitting the *prima facie* case, may not the keeper show that the animal was kept by him with due care and for some commendable purpose,' and that he escaped under circumstances free from fault in him? The keeping of wild animals for many purposes has come to be recognized as proper and useful; they are exhibited through the country with the public license and approval; governments and municipal corporations expend large sums in obtaining and providing for them; and the idea of legal wrong in keeping and exhibiting them is never indulged. It seems, therefore, safe to say that the liability of the owner or keeper for any injury done by them to the person or property of others must rest on the doctrine of negligence. A very high degree of care is demanded of those who have them in charge, but if, notwithstanding such care they are enabled to commit mischief, the case should be referred to the category of accidental injuries, for which a civil action will not lie."

In *Scribner v. Kelly*⁶ the court places liability of the keepers of animals squarely on the ground of negligence. Scrugham, J., speaking for the court, had this to say: "The liability of the owner or keeper of an animal of any description, for an injury committed by such animal, is founded upon negligence, actual or presumed. It is not in itself unlawful for a person to keep wild beasts, though they may be such as are of a nature fierce, dangerous and irreclaimable; but as the propensity of such animals to do dangerous mischief is well known, and is inherent and not to be eradicated by any effort at domestication, nor restrained except by perfect confinement or extraordinary skill and watchfulness, the owner or keeper of such dangerous creatures is required to exercise such a degree of care in regard to them as will absolutely pre-

6. *Woolf v. Chalker* (1862) 31 Conn. 121.

7. *Sarch v. Blackburn* (1830) 4 C. & P. 297 (*nisi prius*) "... undoubtedly a man has a right to keep a fierce dog for the protection of his property; but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it."—Tindal, C. J.

8. Cooley on Torts, 2d. Ed. note 3, page 412. "As to the law respecting the keeping of wild beasts, we should say that the higher cultivation of the intellect of the mass of the people as com-

pared with two or three centuries ago, and the recognition of wants in human nature then ignored, must have worked some changes, and that we must take up the common law of that period in this as in many other particulars more to locate accurately our point of departure than to fix definitely a stake to which we must tie and adhere. When wild animals are kept for some purpose recognized as not censurable all we can demand of the keeper is that he shall take that superior precaution to prevent their doing mischief which their propensities in that direction justly demand of him."

9. (1862) 38 Barb. (N. Y.) 14.

vent the occurrence of an injury to others through such vicious acts of the animal as he is naturally inclined to commit. Under such circumstances the occurrence of the act producing the injury affords sufficient evidence that the owner or keeper has not exercised the degree of care required of him, and his failure to do so is negligence."

In that case the plaintiff sued to recover damages for an injury caused by the fright of the plaintiff's horse at the sight of the defendant's elephant which was travelling on a public thoroughfare. The court very properly applied the test of foreseeability. "In this case the injury resulted not from the act of the elephant, but from the fact that his appearance, as he was passing along the highway, caused the horse of the plaintiff to become frightened and unruly. To render the defendants liable for the damage that accrued, it would be necessary to show, not only that such is the effect of the appearance of an elephant upon horses in general, but also that the defendants knew or had notice of it; for if it is conceded that the elephant is of a savage and ferocious nature it does not necessarily follow that his appearance inspires horses with terror."¹⁰

It is submitted that the rule laid down in the *Scribner* case is desirable in that it furnishes a criterion long established in the law and capable of a fairly consistent and logical application. It is believed that were a like principal case presented where the dog is known to be vicious but not known to be diseased, most courts that have adopted the "liability at peril" doctrine, or the extreme rule stated in the case under review, i. e. that the keeping of an animal known to be vicious is wrongful and the keeper's duty is to kill it would, as indicated in *McCaskill v. Elliott* cited in note 8, *supra*, impose responsibility only for "all the harm *that he might reasonably have expected to ensue*,"¹¹ and so not impose liability for rabies. (Italics supplied.) This is in fact no more than saying that the keeping of an animal after knowledge of its vicious propensities is negligence and that such a negligent wrongdoer will be liable for all the foreseeable consequences of his negligent conduct. Suppose A keeps a vicious watch-dog; B, an aged person who lives next door to A, is knocked down and injured or killed by the dog while the dog is pursuing

10. *Accord. McCaskill v. Elliott* (1850) 5 Strobbarts Law (S. Carolina) 196, 53 Am. Dec. 706, holding that "... every such animal (dog known to be vicious) the owner keeps at his risk, being, without regard to care or negligence, an insurer against all the harm that he might reasonably have expected to ensue." (Italics supplied.)

This case illustrates an attempted

couple of 'liability at peril' with 'foreseeability', which, it is submitted, in fact is nothing more than saying that the keeping of a dog after knowledge of its vicious propensities, is negligence, and that liability is then measured as in any other case of negligence i. e. foreseeability.

11. *McCaskill v. Elliott*, note 10, *supra*.

a thief who has been upon A's premises. Is it to be believed that an action will lie for the injury or death?

The so-called doctrine of absolute liability or doing at peril has appeared in other branches of the law. From the cases it would appear that it has very generally been either frankly repudiated or has become so decimated by limitation that it scarcely merits consideration as a principle of law. Notable among these cases is *Fletcher v. Rylands*¹² where it was laid down that one who collects water upon his land is under an absolute duty, at all events to restrain the water from escaping so as to damage. In the very next case to come before an appellate English Court¹³ the rule was relaxed so as to exclude acts of *vis major* or the acts of other persons over whom the defendant had no control.¹⁴ This broad principle has been very generally repudiated in the United States.¹⁵

And so in the case of fire, it is said that at early common law one set out a fire at his peril.¹⁶ But under the modern law the decisions are practically unanimous in declaring the duty is to exercise care in the light of all the circumstances.¹⁷

It is curious to note that Blackburn, J., in his opinion in *Fletcher v. Rylands*,¹⁸ rests the rule he there lays down as to confining water at peril upon the decisions defining the duty of keepers of vicious animals. The rule of liability at peril has broken down in the cases of fire and water. It is an arbitrary, unwieldy and illogical rule and it is believed the reason why it has not been more generally repudiated in the case of animals is that the element of useful property value in animals has not sufficiently appealed to the courts to incline them to a departure from the original rigid rule of liability at peril, as has been done in cases of fire and water as incident to the use of land. The results in the animal cases have been in most instances sufficiently desirable to permit the courts to gloss over the reasoning employed to support their decisions.

12. (1866) L. R. 1 Ex. 265, L. R. 3 House of Lords 330, 1 Eng. Ruling Cas. 235.

13. (1876) Court of Appeals. *Nichols v. Marsland*, 2 Ex. D. 1 (s.c. 46 L. J. Ex. 174.)

14. By a constant paring down by limitation little appears to remain of the broad principle laid down in *Fletcher v. Rylands*. In the case of *Eastern and South African Telegraph Co. v. Cape Town Tramways Co.*, Privy Council, 1902, L. R., 1902, Appeal Cases 381, the court employs the curious device of turning from the acts of the defendant to the use the plaintiff was making of his land in order to obtain an obviously desirable

and reasonable result without absolutely repudiating the decision in *Fletcher v. Rylands*.

For a review of the English cases under *Fletcher v. Rylands* see note in 1 Eng. Ruling Cas. page 266.

15. Mr. Freeman, the editor of *American Decisions*, says in a note, 29 Am. Dec. 149, that "the doctrine is not adopted in this country". And Mr. Justice Holmes condemns it in 14 *American Law Review* p. 1.

16. *Salmond on Torts*, 3rd. Ed. 224.

17. *Salmond on Torts*, 3rd Ed. 226; *Cooley on Torts*, 2d Ed. 700.

18. See note 12, *supra*.

It is submitted that tort liability must flow out of two kinds of acts, (1) wilful acts, wrongful in themselves; (2) negligent acts. The doing of wilful acts renders the actor liable for all the *natural* consequences flowing from them without regard to anticipability. The test to be applied is one of physical causation. But the doing of negligent acts renders the actor liable only for the *natural and probable* consequences of his acts. The test applied in Missouri to determine liability for negligent conduct appears to be that of foreseeability."

The facts in the instant case do not show acts wilful and wrongful in themselves. There is no wrong for which either a criminal or civil action will lie in keeping a vicious dog. It is true that the *dicta* in some of the cases go so far as to declare a vicious dog to be a public nuisance which may be abated by killing the dog, but it is believed that none of the decisions goes this far. In the cases examined the dog was running loose (this is certainly negligence) and had therefore become a nuisance through the negligence of the owner.

If the public welfare requires the absolute destruction of vicious dogs or animals fierce by nature (these classes of animals are universally treated together) it is the function of the legislative branch to meet this need. In the instant case a city ordinance had accomplished the result desired. Blair, J., and Woodson, J., concurred in the result only upon the count based upon the city ordinance. It is submitted that the opinion of Woodson, J., contains a more desirable statement of the law, and it is hoped, his position will be adopted when the point is again presented for decision. He says in part, page 670: ". . . . no liability is shown upon the first count. My reasons for so stating are: The evidence conclusively shows that the deceased child would not have died from the effects of the dog bite had it not been afflicted with rabies, and the evidence also conclusively shows that the defendant had no notice or knowledge whatever that the dog had rabies before, or at the time, it bit the child. That being true, he was guilty of no negligence which caused or contributed to the injury which caused the death of the child, and therefore he is not liable in damages for the death that ensued therefrom."

D. W.

19. *Saxon v. Missouri Pacific Ry. Co.* (1903) 98 Mo. App. 494, 501, 72 S. W. 717: "Consequences must be probable as well as natural" - "one which might reasonably have been foreseen by a man of ordinary intelligence and prudence."

Paden v. Van Blarcom (1903) 100 Mo. App. 185, 192, 74 S. W. 124; *Aldrich v. St. Louis Transit Co.* (1903) 101 Mo. App. 77, 74 S. W. 141; *Feddeck v. St. Louis Car Co.* (1907) 125 Mo. App. 24, 102 S. W. 675.

CRIMINAL LAW—HUSBAND AND WIFE—PRESUMPTION OF COERCION. *State v. Bragg*.¹ In *State v. Kiethley*² the court was apparently of the opinion that in the prosecution of a woman for keeping a bawdy house there is no *presumption* that she was coerced by her husband even though he is present at the commission of the crime. On the other hand it was indicated that the defendant would have been entitled to an instruction that the jury in determining her guilt should take into consideration her relationship with her husband provided there had been a request for such an instruction. The decision under review is in accord.

The general rule is that whatever of a criminal nature the wife does in the presence of her husband is presumed in the absence of evidence to the contrary to have been done through his coercion.³ There are certain exceptions to this general rule. It is generally conceded that there is no presumption in treason or murder⁴ and probably in "other heinous offenses", as well as in those crimes peculiarly likely to be engaged in by women.⁵ The problem that deserves consideration is: is there in crime, however trivial or gross, committed by a married woman in her husband's presence, any longer a valid reason for a presumption of coercion?

The answer to this question is not difficult. It has been stated that the rule is "an anomaly in our jurisprudence for which it is not easy to offer a perfectly satisfactory explanation";⁶ that: "The contention that a wife has no more intelligence or responsibility than a child is now out of date. No one believes it",⁷ and that "the presumption - - - having been created solely by judicial decision should be set aside in the same mode, since we have advanced from the barbarism upon which it was based."⁸

1. (1920) 220 S. W. 25.

2. (1910) 42 Mo. App. Rep. 417, 127 S. W. 406.

3. 1 Wharton Cr. Law, Secs. 96 & 97; 1 Bishop New Cr. Law Sec. 357 *et seq.*; *State v. MaFoo* (1892) 110 Mo. l. c. 16, 19 S. W. 222; *People v. Ryland* (1884) 97 N. Y. 126; *State v. Williams* (1871) 65 N. C. 398.

4. 1 Bishop New Cr. Law, Sec. 361. Mr. Bishop states that these crimes are commonly excepted and more than mere presence is required to raise the presumption. Mr. Wharton states as a matter of principle that if the presence of the husband is a good defense at all it is good in all classes of crimes. Apparently, he was referring to coercion, as

a defense and not to any presumption. Mr. Bishop's analysis is more careful and, carefully read, does not state that coercion ceases to be a *defense* in cases of murder, treason or robbery. Compare *Bibb v. State* (1892) 94 Ala. 31, 10 So. 506, 33 Am. St. Rep. 88, denying the defense of coercion in murder.

5. 1 Wharton Cr. Law, Sec. 99; 1 Bishop's Cr. Law, Sec. 361; *State v. Keithley* (1910) 142 Mo. App. l. c. 421, 127 S. W. 406; *People v. Wheeler* (1905) 142 Mich. 212, 105 N. W. 607.

6. Note to *Bibb v. State* (1892) 33 Am. St. Rep. 89.

7. *State v. Seahorn* (1914) 166 N. C. 373, 81 S. E. 689.

8. See note 49 Am. Law Rev. 447.

Also, in Kansas,⁹ the court in a forward looking decision, repudiating the presumption, said: "But it cannot be right now under our present condition of society. And it is not the law. There was once a reason for the presumption; but that reason has long ago ceased to exist in Kansas; and when the reason for the presumption has ceased to exist, the presumption itself must also cease to exist."

Arkansas has perhaps abolished the presumption by statute¹⁰ and in referring to this ruling Gantt, P. J., in *State v. MaFoo*,¹¹ said: "The statutory rule in Arkansas, *supra*, is more in accord with the spirit of the age in which we live." These authorities might be multiplied,¹² for this rule although undoubtedly the law in a majority of jurisdictions in this country, seems to be nowhere defended in reason, and is continually criticised.

The reason for its continued existence may lie in the explanation given by way of *dictum* by Beardsley, J., in *Blakeslee v. Margaret Tyler*,¹³ to-wit: "The presumption in many, if not in most cases, probably rested upon a slender basis of fact, but generally prevailed, owing to the inherent difficulty of proving that it was not well founded."

When the reason for a rule fails the rule fails. Such has been the boast of the common law judges. The chief virtue of the system lies in its pliability and susceptibility to reason and change. There is none to deny that this rule has in reason failed; yet many courts still follow it. *State v. Miller*¹⁴ shows to what extreme the rule has led us. The wife there at the request of the husband, who was in jail, secured a revolver and carried it to him. She was convicted on a statutory charge and upon

9. *State v. Hendricks* (1884) 32 Kan. 559, 4 Pac. 1050.

10. *Frell v. State* (1860) 21 Ark. 213.

11. (1892) 110 Mo. l. c. 17, 19 S. W. 222.

12. 1 Wharton Cr. Law, Sec. 96: "The difficulty, however, is in finding, in the present state of society, when the husband is as likely to support the wife if she is engaged in doing wrong, as the wife is to support the husband, any reason on which the presumption is to rest." See also *Smith v. Myers* (1898) 54 Neb. l. c. 6, 74 N. W. 277.

8. Har. Law Rev. 430: "This presumption of coercion in criminal cases seems to have preserved a place in our law long after all reason for it has passed away."

13. (1887) 55 Conn. l. c. 300, 11 Atl. 855.

14. (1901) 162 Mo. 253, 85 Am. St. Rep. 498, 62 S. W. 692. See also 15 Har. Law Rev. 234 for a criticism of this decision: "So far from following this tendency, the principal case seems to be an unwarrantable extension of the doctrine. The intention was formed, the execution of the crime begun and all but completed outside the jail, and the fact that the defendant came into her husband's actual presence simultaneously with the completion of the crime can hardly justify the presumption in question. . . . Even if coercion could be presumed, slight circumstances will rebut it, and the jury should have been allowed to decide whether the husband's helpless situation was sufficient to do so."

appeal the court allowed the point that there was a presumption of coercion, and that there was not sufficient evidence to justify the jury in finding that she was not coerced. If the test is alone coverture and presence, the decision, it is submitted, is sound, but if the test is ability to coerce, a likelihood that she was prevented from acting as a free agent the decision is nearly, if not quite, absurd.

It is submitted that the rule is unsound, illogical and cumbersome to justice. It should therefore be abolished. The statement of a North Carolina¹ court seems a sufficient justification. "- - - the presumption - - - having been created solely by judicial decisions should be set aside in the same mode". There is no need for legislative interference. What society knows is absurd should not be a part of the law. It is to be hoped that when the matter again comes before the Supreme Court of Missouri the doctrine will be repudiated and coercion be required to be proved as a matter of fact.

C. L. C.

PRACTICE—DIRECTION OF THE VERDICT FOR THE PARTY BEARING THE BURDEN OF PROOF. *Quisenberry v. Stewart et al.*¹ Ejectment. The land in dispute was for some years within the fence boundaries of the land now owned by the defendant. The plaintiff put in evidence his paper title and then a survey, and this testimony showed that the disputed strip was within the description called for by the paper title. The defendant offered evidence that the fence was erected on an agreed line. It was held that the credibility of the defendant's evidence was solely a question for the jury. It cannot be said that defendant's evidence was unequivocal and wholly uncontradicted and, so, without question the actual decision of the court is sound. The case, however, is of interest because of its approval of a statement in *Hunter v. Wethington*.²

"As this case will have to be retried, there is one other question to be noted. Defendant contends that as two witnesses testified to the adverse possession in defendant for ten years, the trial court could not do otherwise than to find for the defendant. This does not necessarily follow. The credibility of that testimony, although undisputed by direct testimony, was for the trier of the facts."

1. (1920) 219 S. W. 625. See also *Prints v. Miller* (1911) 233 Mo. 47, 135 S. W. 19, and *Johnson v. Grayson* (1910) 230 Mo. 380, 130 S. W. 673, holding a verdict will not be directed for plaintiff in a law case where the allegations of his petition are denied and he introduces oral evidence to support his cause of

action. But see the following cases: *May v. Crawford* (1899) 150 Mo. 504, 51 S. W. 693; *Crawford v. Stayton* (1908) 131 Mo. App. 263, 110 S. W. 665.

1a. (1907) 205 Mo. l. c. 292, 103 S. W. 543.

This case is the last case in Missouri approving the doctrine that a trial court may not direct a verdict in favor of the party bearing the burden of proof though he may have sustained the burden with uncontradicted testimony.

There are two theories on which the courts today direct verdicts. First, the court may direct against the plaintiff only when there is no evidence in his favor.² Second, the court may direct against the plaintiff in case the jury as reasonable men could not possibly find for him, or as a Massachusetts court³ puts it, in case the jury found for the plaintiff, the court would be compelled to set the verdict aside any number of times as being against the evidence.

Missouri, however, has adhered to a policy of great liberality in leaving questions of fact to the jury for final determination. And the rule in Missouri today is that the evidence must be construed in its strictest sense against the defendant, including all inferences that can be made against him, allowing no inferences for the defendant to offset, and if then there is evidence enough to support a verdict, the motion for a directed verdict must be overruled.⁴

Having then in mind the two theories on which a court will direct a verdict, the next question to arise is, should a court direct a verdict in favor of one bearing the burden of proof? According to the principal case the court should not. The grounds on which this decision is upheld are (1) that it is the province of the jury to pass upon the evidence,⁵ and (2) that the jury should say whether they *believe* the witnesses.⁶ It is contended that to take from the jury this question is to deprive the people of the right of trial by jury.⁷ Is such a contention true?

No court will refuse to direct against the plaintiff, if he has not offered a scintilla of evidence,⁸ yet many courts will not direct in his favor, though he has made a strong case, and there is not a scintilla of evidence against him.⁹ Why? Does this seem to be a sound principle for the speedy and economical administration of justice? Can we truthfully say that a person is deprived of any of those rights assured by trial by jury if he has a verdict directed against him under such circumstances? He may ask for a new trial, or appeal the same as if the case had gone

2. *Way, Administrator, etc., v. The Illinois Central R. R. Co.* (1872) 35 Ia. 585.

3. *Denny v. Williams* (1862) 5 Allen 1.

4. *Maginnis v. Railroad* (1916) 268 Mo. 1. c. 675, 187 S. W. 1165.

5. *Luhrs v. Brooklyn Heights R. Co.* (1896) 11 App. Div. 173, 42 N. Y. Supp. 606. See 10 Harvard Law Review 453.

6. *Bryan v. Wear & Hickman* (1885) 4 Mo. 106.

7. *Woodin v. Durfee* (1881) 46 Mich. 424, 9 N. W. 457.

8. *San Antonio Traction Co. v. Levyson* (1908) 52 Tex. Civ. App. 122, 113 S. W. 569.

9. *Prints v. Miller* (1911) 233 Mo. 1. c. 49, 135 S. W. 19.

to the jury.¹⁰ In a jurisdiction where the second theory prevails he has lost nothing more than the possible chance of having the jury return a verdict in his favor, which must immediately be set aside as against the evidence.

But it is contended that this makes the court and not the jury decide on the truthfulness of the witnesses.¹¹

In *Pleasants v. Fant*,¹² Miller, J., says: "In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all of the evidence, the preponderating evidence is in his favor, that is the business of the jury, but conceding to all of the evidence offered, the greatest probative force which to the law of evidence it is fairly entitled to, is it sufficient to justify the verdict? If it does not then it is the duty of the court after verdict, to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of the plaintiff, that verdict would be set aside and a new trial granted."

If this reasoning be sound, and there are many cases¹³ in accord, it must be conceded that the court can decide this point as well before verdict as after, and the jury is deprived of none of its duties by the court directing their verdict.

But it is sometimes contended that though a court may direct against the plaintiff, it cannot direct for him, because there must be an agreement of facts before the court is entitled to pass on them.¹⁴ It is said that in the case of directing against the plaintiff, the defendant, by asking for the direction admits all of testimony of plaintiff as true and consents that the court may pass on it as a fact, but in case of the plaintiff asking for verdict, he cannot admit his own testimony as facts and consent for the defendant, hence it must be for the jury and not for the court to decide the question of fact.

It would seem that this objection may be overcome by applying a rule used in pleading, namely, that an averment not denied is admitted. If plaintiff offers an abundance of testimony, which the defendant neither attempts to deny, nor impeach the witnesses by whom it is offered, then may we not say that the defendant must admit the truth of plaintiff's testimony?

10. *Meyer v. Houck* (1892) 85 Ia. l. c. 327, 52 N. W. 235.

11. *Gannon v. Laclede Gaslight Co.* (1898) 145 Mo. 502, 46 S. W. 968.

12. (1874) 22 Wall. 116.

13. *Sprague v. Androscoggin County* (1908) 104 Me. l. c. 354, 71 Atlantic 889.

14. 12 Harvard Law Review 433.

In *Gannon v. The Laclede Light Company*¹⁵ this point arose, and though the case was decided according to the rule announced in the case under review, there is a strong dissenting opinion by Marshall, J., in which Sherwood and Brace, JJ., concurred. He states that if there is no controversy over the facts, there is no question for the jury, and says: "If the facts are shown by competent evidence on one side, and the evidence is not contradicted on the other, and there is no attempt to impeach the witnesses, there is no *question* of fact involved in the case, but a simple question of law presented. To permit a jury to say that it will not believe competent uncontradicted and unimpeached testimony and to return a verdict in the teeth of such evidence, is to give the jury plenary power to take a man's life or property as caprice or willfulness may dictate."

There are many earlier decisions in the state which hold that a trial court may direct a verdict in favor of either party as pointed out in this dissenting opinion.

In *Morgan v. Durfee*¹⁶ Sherwood, C. J., observed that it was not usurping the power of the jury for the court to direct in favor of either party, but rather that it was a duty which it should exercise, and which is often shirked. He speaks of it as a power of a trial court, seldom used, "owing to a pitiful and painful weakness in the dorsal region". A later review of this decision, in the *Central Law Journal*,¹⁷ goes even further in commenting upon trial courts for refusing to direct a verdict in favor of either party.

There are quite a few decisions¹⁸ holding that a trial court may direct a verdict for either party including the party having the burden.

The question after all is said is simply this: there are cases where it is evident to the judicial mind that there is such uncontradicted testimony that if the jury brought in a verdict in the face of such testimony, it would be the plain duty of the court to set aside the verdict as against the evidence. We submit that in such cases it would be a better and more practical rule for the court to direct a verdict. We further submit that it works no hardship nor does it deny any rights guaranteed by a trial by jury. The following reasoning by a well known author correctly states the matter thus:¹⁹

15. (1898) 145 Mo. 502, 46 S. W. 968, 47 S. W. 1. c. 916.

16. (1879) 69 Mo. 469.

17. 9 *Central Law Journal* 102.

18. *Woodstock v. Canton* (1897) 91 Me. 62, 39 Atl. 281; *Chanute v. Higgins* (1902) 65 Kan. 680, 70 Pac. 638; *Meyer v. Houch* (1892) 85 Ia. 319, 52 N. W. 235; *Webber v. Axtell* (1910)

110 Minn. 52, 124 N. W. 453; *Marshall v. Grosse Clothing Co.* (1900) 184 Ill. 421, 56 N. E. 807; *Donnan v. Donnan* (1912) 256 Ill. 244, 99 N. E. 931; *McArthur Co. v. National Bank* (1889) 182 Mich. 223, 81 N. W. 92.

19. See 11 Mich. Law Review 198 for discussion of this subject by Professor Sunderland, a recognized authority on pleading and practice questions.

"The basic principle underlying the cases which deny the court the right to instruct the jury in favor of the party having the burden of proof, is, as already indicated, that the jury has the right to disbelieve all the witnesses even though the facts to which they testify are uncontroverted and inherently credible, and the witnesses unimpeached. Why the jury should be given any such license it is hard to understand. Juries cannot be permitted to exercise blind and unreasoning power to oppress litigants. They must conduct themselves as sensible and reasonable men. They cannot be suffered to base verdicts on caprice, conjecture, passion or prejudice."

P. M. P.

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—INDICTMENT AND INFORMATION. *State v. Adkins*¹. Accused was charged by information with murder in the first degree. He was convicted of murder in the second degree and appealed to the Supreme Court of Missouri. There the judgment was reversed and the cause remanded on account of an erroneous instruction. The fact that the word "the" before the word "state" was omitted from the conclusion of the indictment was held not to be reversible error even though the Constitution of Missouri provides " . . . and all indictments shall conclude, 'against the peace and dignity of the State'."²

Under early common law, indictments were framed according to fixed forms, established by statute or by custom and practice. Such resulted in part from the creation of many new offenses; in part from the development of the art of special pleading; and especially from the severity of the criminal law of the period. As a natural result there was an effort to pick flaws in the indictments. This resulted in the framing of complicated and formal indictments. The least departure from fixed forms would have been fatal.³

The conclusion of the indictment charging a common law offense was in a specifically required form for an additional reason. This part was to show to whom the forfeiture would accrue and was in these words: "against the peace of our lord the king (our lady the queen) his (her) crown and dignity". In view, then, of the requirement of formal indictments, even an immaterial departure from this phrased conclusion would have been error.

During the early part of the nineteenth century there was great improvement in England. Statutes were passed removing most of the

1. (1920) 225 S. W. 981.

2. Article VI, Sec. 38.

3. "The Indictments Act", Jour. Com. Leg. (1916) Vol. 16 N. S. p. 238.

technical requirements.* And although some statutory requirements remained, the courts became less strict and literal compliance with the statutes was rarely required. This reaction came with the decrease in the number of offenses and the lessening of the severity of punishment. Substantial compliance with the statutes became sufficient.*

Most of the states in this country have by constitution or statute required some fixed form for indictments, especially of conclusions of indictments. Nevertheless, it has been generally held that only substantial compliance with the required form is necessary.*

The Missouri courts have declared that substantial compliance with the formal requisities in indictments, as provided by the constitution or statutes, is sufficient. The difficulty has been to determine what is substantial compliance. In *State v. Lopez*⁴ an indictment concluding "against the peace of the statute and of the statute in such cases made and provided" did not meet the constitutional requirement for a conclusion "against the peace and dignity of the State". In *State v. Mitchell*⁵ the indictment was quashed for using the words ". . . did . . . disturb a congregation", instead of "congregation". The court there said the word "congration" was not an English word. However they seemed to base their decision on their belief that such relaxation would tend to establish a precedent for disregarding required forms. In *State v. Waters*⁶ the indictment concluded: "Against the peace and dignity of the State, and contrary to the form of the statutes in such cases made and provided by the State", instead of merely "against the peace and dignity of the State", as provided by the constitution. The court held that, as the words required were present, the remainder was surplusage. It was stated by Lewis, J.: "The general doctrine is that, if the intent of the Constitution be substantially responded to in this part of the indictment, a literal transcript of the formula is not necessary". This principle was followed in *State v. Hays*,⁷ where the words "of Missouri", following the word "State", were held not to vary, enlarge, or change the phrase or the sense. *State v. Schloss*⁸ also held that words added to the required phrase were surplusage and that the required words being present, there was substantial compliance with the constitution. The court distinguished the case from *State v. Lopez, supra*, and *State v. Pemberton*,⁹ in which

4. Jour. Com. Leg. Vol. 16 N. S. p. 239-247.

5. See *State v. Hornsby* (1884) 8 Rob. (La.) 554.

6. For a review of the American cases, see 22 Cyc., p. 244, note 93.

7. (1853) 19 Mo. 255.

8. (1857) 25 Mo. 420. Compare

State v. Duvenick (1911) 237 Mo. 185, 140 S. W. 897, holding "against the peace and dignity of the state" is sufficient.

9. (1876) 1 Mo. App. 7.

10. (1883) 78 Mo. 600.

11. (1887) 93 Mo. 361.

12. (1860) 30 Mo. 376. Indictment in two counts. First count omitted the en-

cases "neither the constitutional words, nor words of like import, were used".

In *State v. Campbell*,¹³ the conclusion of the indictment omitted the word "the" before "State". The court adopted the principle laid down in *State v. Waters*, *supra*, that matters of substance and not of form would be required. Nevertheless, the court held that the omission of the word "the" was reversible error because the definite article "the" was necessary "in order to designate the particular state against which the offense is charged to have been committed". It is possible to argue that the court was of the opinion, also, that every constitutional requirement is a matter of substance and that any alteration of the form specified would be fatal. This seems not to be the generally accepted law.¹⁴ *State v. Skillman*¹⁵ was decided at the same term and follows *State v. Campbell*. *State v. Warner*¹⁶ likewise follows and relies upon *State v. Campbell*.

The formal conclusion in an indictment does not serve the purpose that it did at common law. It is at most a debatable question if there is any purpose served by the conclusion of the indictment specified in the constitution of this state.¹⁷ It is hardly probable that the accused does not know that he is accused of violating the laws of the State of Missouri since the indictment commences "State of Missouri", etc.

The purposes of an indictment are: first, to enable the accused to prepare his defense; second, to enable him to plead as a defense, his former conviction or acquittal, in case he is again prosecuted for the same offense; and third, to give the court opportunity to decide the case on the indictment without hearing the evidence.¹⁸ It is clear that the omission of the word "the" in this instance will deny none of these rights. If, then, this omission deprives the accused of no information to which he is entitled, and if the word cannot be said to be a matter of substance, it remains that its presence serves at most to complete a mere rhetorical flourish, and its omission should not be reversible error.¹⁹

The decision under review marks a definite step in advance. The

tire phrase "against the peace and dignity of the State". See discussion in *State v. Stacy* (1890) 103 Mo. 11, 15 S. W. 147; *State v. Ulrich* (1902) 96 Mo. App. 689, 70 S. W. 933.

13. (1907) 210 Mo. 202, 109 S. W. 706, 14 Ann. Cas. 403.

14. *Pacific Railroad v. The Governor* (1856) 23 Mo. 353, 66 Am. Dec. 673; *State v. Foster* (1876) 61 Mo. 549; *Riesterer v. Land & Lumber Co.* (1900) 160 Mo. 141, 61 S. W. 238; *Creason v. Yardley* (1917) 272 Mo. 279,

198 S. W. 830. Compare *State ex rel. v. Hitchcock* (1911) 241 Mo. 1 c. 464, 146 S. W. 40.

15. (1907) 209 Mo. 408, 107 S. W. 1071.

16. (1909) 220 Mo. 23, 119 S. W. 399.

17. See 50 Am. Law Rev. pp. 305-310.

18. See 24 Har. Law Rev. 290, "The Seventeenth Century Indictment in the Light of Modern Conditions".

19. See 68 Central Law Journal, p.

gratitude of the bar is due to Williamson, J., whose progressive mind sought for an opportunity to correct a point of view that has caused no inconsiderable lack of respect for law and legal institutions. The commendable opinion re-vitalizes the law of criminal procedure in Missouri.

Virgil Rathbun²⁰

PLEADING—FALSE IMPRISONMENT—SURPLUSAGE. *Hill v. S. S. Kresge Co. et al.*¹ The court in the above case—an action for false imprisonment—made the following statement: "If plaintiff unnecessarily pleaded malice in his petition in connection with his request for actual damages, there is no question but that it would be necessary for him to prove and submit malice in his instructions covering such damages."

It is a general rule that anything in a petition that is unnecessary to the cause of action may be regarded as surplusage, and proof thereof is not necessary to sustain the cause of action.² It is an undenied rule that malice and want of probable cause are not necessary elements of false imprisonment.³ It would seem then, by all the rules of pleading, that allegations of malice and want of probable cause in a petition for false imprisonment are surplusage and might be disregarded.

The statement quoted is, therefore, apparently fallacious and unsound in principle. It is interesting to trace back and see how the doctrine started and how such a statement has crept into Missouri law.

In the principal case the rule is merely laid down by the court and no reason or justification is given. We must then look to the citations given by the court to find the reasons for the rule.

There are two citations given and turning to the first, *Billingsley v. Kline Cloak Co.*,⁴ we find that the rule there stated was not exactly as stated in the case under review but as follows: "We have already called attention to the fact that plaintiff alleged the arrest and imprisonment were without probable cause, and that she tried her case on that theory and she concedes that she must abide by that theory in this court."

Perhaps this conclusion is sound as the plaintiff had not merely alleged unnecessary facts in a petition but had adopted a theory throughout a trial that he later attempted to repudiate. The court in the case

421, for review and criticism of *State v. Campbell* (1907) 210 Mo. 202, 109 S. W. 706, 14 Ann. Cas. 403

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1. (1919) 217 S. W. 997.

2. Pattison Missouri Code Pleading,

2nd Ed. Sec. 103. 24 Standard Encyclopedia of Procedure 580. *Hudson v. The Wabash Ry. Co.* (1890) 101 Mo. 13, 14 S. W. 15.

3. 12 Ann. Cas. 35.

4. (1917) 196 S. W. 415.

just quoted from cities five cases⁵ and from Cyc⁶ to support the rule. One of the cases cited is *Murphy v. McAdory*, the second citation given in the principal case.

Taking up the Cyc reference, we find a statement that it is sufficient to allege that the imprisonment was "against his will and illegally", but at the end of the paragraph, there is this sentence, "It has been held that if plaintiff alleges malice and want of probable cause, although unnecessary, he must prove those elements." It would seem that the court took this statement of the Cyc author, Judge E. A. Jaggard, formerly of the Minnesota Supreme Court, to be the law without considering the reasonableness or basis therefor; for looking at the Cyc footnote, we find but one citation, *Fuqua v. Gambill*, one of the five cases mentioned above. We must then turn to the cases mentioned for the basis of the rule.

Russell v. Chester and *Pritchett v. Sullivan* are the only cases cited that are not Alabama cases. The latter is a Federal case and cites the former as the sole authority for the point decided. The point decided in these cases, however, is not the point for which they are cited by the Missouri court. The cases hold that want of probable cause having been pleaded by plaintiff the defendant, an officer who arrested without a warrant, may, under the general denial, show probable cause on his part for believing a felony had been committed. That an officer may arrest without a warrant upon reasonable suspicion that a felony has been committed is pointed out in these cases. These cases are not in point and may be disregarded. This leaves three Alabama cases to support the rule. Two of them refer directly to the third, *Rich v. McInerny*. This case, then, would seem to have been the basis for the announced rule, and to it we must turn for the reasons supporting the rule.

From the opinion of Head, J., we find that in 1849 in *Ragsdale v. Bowles*,⁷ an action for *malicious prosecution*, the averments of the complaint were, "that the defendant falsely, maliciously and without probable cause," etc., did certain things. The declaration was demurred to on the ground that it did not sufficiently aver the termination of the prosecution. The court held the count bad for malicious prosecution, but a sustainable count for false imprisonment. The court's conclusion evidently being that the words, "falsely, maliciously and without probable cause", were sufficient to show that the imprisonment was unlawful. It is clear that the court did not intend to say that these elements were essential to the action. Shortly after this case was decided, the Ala-

5. *Russell v. Shuster* (1844) 8 Watts & S. (Pa.) 308; *Fuqua v. Gambill* (1903) 140 Ala. 464, 37 Southern 235; *Rich v. McInerny* (1893) 103 Ala. 345, 15 Southern 663; *Pritchett v. Sullivan* (1910) 182

Fed. 480, 104 C. C. A. 624; *Murphy v. McAdory* (1913) 183 Ala. 209, 62 Southern 706.

6. 19 Cyc (339) 359.

7. (1849) 16 Ala. 62.

bama Code of 1852 was adopted. In it was contained a schedule of forms for various actions, and for the form for false imprisonment substantially codified the declaration of the Ragsdale case. The same form, save for the correction of a minor error, has been carried into the code of 1907.⁸ But the code itself thus defines false imprisonment: "False imprisonment consists of the unlawful detention of the person of another, for any length of time, whereby he is deprived of his personal liberty."⁹

It appears that an essential difference exists between the elements of false imprisonment, as laid down by the code and the pleading form given in the code. Head, J.,^{9a} in explaining says: "We are of opinion that it was not the intention of the legislature to make this form exclusive. We cannot suppose it was designed to abolish the probably graver offenses of false imprisonment, civilly actionable, which are not characterized by the elements the form makes essential. This question, however, is not now before us, since the present complaint pursues the form prescribed. - - - Being alleged, these elements must be shown to have existed, to justify a recovery by the plaintiff."

The Alabama court did not attempt to lay down a general rule that malice and want of probable cause, if pleaded, must be proved. The court only held that where one pleads under an erroneous form placed in the Alabama Code, then he must abide thereby and prove his complaint though it does contain elements which would not otherwise be essential to his cause of action. This decision may be sound because of the peculiar situation that arises under the Alabama code. As a general proposition of law, it is submitted that it is not sound and that such a decision anywhere other than under the Alabama code is erroneous.

Standard Encyclopedia of Procedure¹⁰ states the rule in almost the same words as Cyc but adds: "The better holding would seem to be to regard them merely as surplusage which need not be proved, or as inserted to enhance the damages." After citing all of the cases in accord it is noted that they are all controlled by the Alabama code.

In Annotated Cases¹¹ we find the proposition stated and five Alabama cases cited in support. The annotator then states that the view treating it as surplusage is probably the better rule and in support of it cites a California case¹², three Illinois cases¹³ and a New York case.¹⁴

8. Section 5382, Form 19, Code of Alabama 1907, Vol. II—Civil.

9. Section 4238, Code of Alabama, 1907—Vol. II, Civil.

9a. *Rich v. McInerney* (1893) 103 Ala. 345, 1. c. 354, 15 So. 663.

10. 8 Standard Encyclopedia of Procedure 965.

11. 12 Ann. Cas. (1. c.) 36.

12. *Nerves v. Costa* (1907) 5. Cal. App. 111, 89 Pac. 860.

13. *Enright v. Gibson* (1906) 219 Ill. 550, 76 N. E. 689; *Hight v. Naylor* (1899) 86 Ill. App. 508; *Johnson v. Kettler* (1876) 84 Ill. 315. There Scholfield, J., said: "The objection that the

Ruling Case Law¹⁵ mentions the holding and cites *Rich v. McNerny*, *supra*, in accord, and a Minnesota¹⁶ case, *contra*.

From the above review it is found that of the five states in which this point has come up, Missouri is the only one to follow the Alabama case. The court in the principal case evidently accepted the first Missouri decision without question, but it is submitted that the statement is unsound in principle and is not supported by authority.

P. M. P.

declaration charges that the imprisonment was 'without any reasonable or probable cause whatever,' and that the court refused to instruct the jury that it was necessary to make proof of this, would be well taken were the action in case for improperly putting in motion regular process of the court; but the action is for trespass for imprisoning, etc., without legal process, and the *gist* is the unlawful, direct force, and the words,

'without any reasonable or probable cause,' were surplusage. The citation of authorities can not be necessary on a distinction so well established as this is in the elementary works."

14. *Ackroyd v. Ackroyd* (1869) 3 Daly (N. Y.) 38.

15. 11 R. C. L. Art 33, page 819.

16. *Nixon v. Reeves* (1896) 65 Minn. 159, 67 N. W. 989, 33 L. R. A. 506, perhaps not in point.

BAR BULLETIN

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LAW JOURNALS—The increasing usefulness of the current literature of the law, as embodied in the various law journals, is evidenced by the references to such sources in the marginal notes of Mr. Justice Brandeis' dissenting opinion in the Duplex Printing Press Co. case.—Journal Issued by Am. Bar Assoc., Vol. VII, p. 157.

CANONS OF ETHICS—One of the recent activities of our Association has been the printing and framing of the Canons of Ethics. We are trying to get the various local bar associations to see that a framed copy of the canons is displayed in every court house in the state. We have already succeeded in placing them in nine court houses. If our Canons of Ethics are a good thing, we ought not to be ashamed of them and we have found that hanging them in a conspicuous place where the public can read has a very good effect.—R. Allan Stephens, Secretary, Illinois Bar Assoc. in Journal Issued by Am. Bar Assoc., Vol. VII, p. 90.

TRIAL BY JURY—Twelve jurors were sworn and duly qualified on voir dire, in a trial for murder; state and defendant accepted the jury, introduced their evidence, and rested; a recess of two hours

was taken; it was then discovered that the jurors after acceptance had not been sworn "to well and truly try the issue". The court then and there administered that oath, to which defendant objected. Argument proceeded; and a verdict of guilty was rendered.

Held, that the tardy administration of the oath could not cure this fatal error; Smith, C. J., and Etheridge, J., dissenting. (Mississippi; *Miller v. State*, 84 So. 161.) Here we are, then, no further along than the middle ages, in our formalistic administration of criminal justice in the year 1920. Shall we never shake off the shackles of technicalism? "And He said unto them, woe unto you also, ye lawyers! For ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers!"—J(ohn) H. W(igmore) 15 Illinois Law Review 353.

A review of the same decision in 19 Michigan Law Review 115, states that the only other case found that passes on the precise question holds to the contrary. Curiously, the case (*Borum v. State* (1913) 105 Miss. 887.) was decided by the same court and was not noticed in *Miller v. State*.

LEGAL EDUCATION—The Committee on Legal Education, C. Petrus Peterson, of Lincoln, Chairman, recommended that the preliminary requirements for those seeking admission by law office study and examination be raised from three years' high school or the equivalent thereof, to four years in high school or the equivalent thereof, also that preliminary requirements for entrance to law colleges be raised to two years of prior college training.—Allan Raymond, Secretary, Nebraska Bar Assoc. in Journal Issued by Am. Bar Assoc., Vol. VII, p. 91.

In Missouri the only substantial requirement is "a common or grammar school course of study". R. S. Mo. 1919, Sec. 670. Are we to stand still while other states pass by? The Missouri Bar Association bill to raise the standard was adversely reported by the Senate Judiciary Committee of the last General Assembly. If lawyers do not wish the qualifications to be higher how is it expected that laymen will be convinced?

AM. BAR ASSOC. MEETING—Prospects are bright that President Warren G. Harding will spend at least a day at the American Bar Association Convention to be held in Cincinnati, August 30-31, September 1-2.

Within the last few days Mayor John Galvin of Cincinnati, who was largely instrumental in bringing this convention to the Queen City had a conference in Washington with President Harding. During their conversation Mayor Galvin suggested to Mr. Harding that the members

of the association as well as the citizens of Cincinnati would greatly appreciate a visit from the President on this occasion. Without hesitation Mr. Harding assured Mayor Galvin that he would be delighted to attend the meeting and would arrange his affairs accordingly with no possible interference unless Congress be in session at that time.

It is already assured that former Ambassador to England John W. Davis and Honorable Elihu Root will be among the prominent speakers at the convention.—Publicity Committee, American Bar Association.

JUDICIAL CAPACITY—Justice Holmes' long and honorable record of dissenting opinions in cases where the courts have ignored the human rights of labor and have unduly extended the rights of property and "freedom of contract", has given people the impression that he is something of a radical. This, however, is not the case. He is a firm believer in the regime of private property and the traditional economics. His dissenting opinions thus manifest a rare intellectual integrity which enables him to distinguish between his own opinions and that which the Constitution leaves to the Legislature to determine. This lends unusual force to his charge that our court, unduly influenced by the fear of Socialism, "have taken sides on debatable questions" and "have unconsciously read into the Constitution economic doctrines which prevailed fifty years ago". "Judges commonly are elderly men and are more likely to hate at sight any analysis to which they are not accustomed".—Morris R. Cohen, *The New Republic*, Vol., XXV, p. 294.

INCORPORATION OF THE BAR—The bill presented by the committee is entitled, "A Bill to Provide for the Better Government and Greater Usefulness of the Bar of Ohio." After declaring all attorneys at law, and persons thereafter admitted to the practice of law, officers of the Supreme Court of Ohio and members of the State Bar, subject to the provisions of the enactment, a board of governors is created, three representing each of the appellate court districts of the state, making a total of 24 governors, at present. The governors are to be elected biennially by ballot of the entire membership of the State Bar, after nomination by petition signed by at least ten members of the State Bar. The officers of the State Bar are to be chosen by the board of governors from among the members of the board, the secretary being the only officer who is not required to be a member of the board. Jurisdiction is conferred upon the board of governors to investigate complaints and take disciplinary action, by reprimand, suspension or disbarment of attorneys, the action of the board being subject to review by the Supreme Court *sua sponte* or by proceedings in error by the dis-

ciplined attorney. The inherent or statutory powers now possessed by the courts of the State are not affected by the terms of the proposed bill. Provision is made for an annual fee from each member of the State Bar, the funds arising therefrom to be deposited with the State Treasurer and disbursed upon orders of the board of governors. A penalty is provided for practicing without having paid the license fee or without possessing a certificate of good standing in the State Bar. In the hearing of complaints, the board of governors is vested with power to subpoena witness, etc., the same as courts in the trial of causes.

After some discussion the report of the commission was unanimously adopted, not one member present having voiced opposition to the general proposition, and the bill was endorsed by the Association with the understanding that slight amendments would be made before presentation to present session of the legislature.—Report of Ohio Bar Association Meeting, Journal Issued by Am. Bar Assoc., Vol. VII, p. 92.

AXIOMATIC STATEMENTS—This argument carries weight, for alike in equity and in law fraud vitiates all affairs wherein it is predominantly influential.—Goode, J., *State ex rel. v. Speer*, 223 S. W. 659.

It seems to me that the proposition that fraud vitiates consent in criminal matters is not true, if taken to apply in the fullest sense of the word and without qualification. It is too short to be true, as a mathematical formula is true. If we apply it in that sense to the present case, it is difficult to say that the prisoner was not guilty of rape, for the definition of rape is having connection with a woman without her consent, and if fraud vitiates consent every case in which a man infects a woman or commits bigamy, the second wife being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes, and so might acts of prostitution procured by fraud, as, for instance, by promises not intended to be fulfilled. These illustrations appear to show clearly that the maxim that fraud vitiates consent is too general to be applied to these matters as if it were absolutely true.—Stephen, J., *Regina v. Clarence*, 22 Q. B. Div. 23.

I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them.—Lord Esher, M. R., *Yarmouth v. France*, 19 Q. B. D. 647.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.—Mr. Justice Holmes, *Lochner v. New York*, 198 U. S. 1. c. 76.

CRIMES AND PUNISHMENT—In spite of this scientific truth, the worst enemy of law and order is the silly sentimentalist who sees in every brutal criminal only an erring brother, who must be coddled and petted and turned loose again to prey upon the society which he refuses to serve. The man who contemplates a career of crime is given every encouragement. Only a small percentage of criminals is apprehended. If one is apprehended he has better than an even chance of escaping through the maze of legal technicalities, existing apparently to give him a sporting chance. If he does not thus escape, his appeal is usually effective before a jury. If by a rare combination of misadventures he is caught and convicted he listens with a sardonic smile to the sentence of five or ten or twenty-five years. He knows it is a joke. An easy parole or commutation of sentence will save him; or the governor, on Christmas day or May day or Hallowe'en, will invite his soul by pardoning a lot of long-termers. The number of crimes is appalling that are committed by habitual criminals who are at large on parole. The criminal has as good a chance to escape punishment for his crimes as the workman has in some industries of escaping injury from accident. Police efficiency might be improved, though the fault is not chiefly theirs; amendment of the laws might help; but after all, the only cure lies in an aroused public sentiment. The finest code of laws is useless unless the people demand their enforcement; on the other hand, the public usually gets whatever it insistently demands.—Address, Francis M. Curlee, January 26, 1921.

AN EXAMINATION OF SOME MISSOURI LAWS AND
SUGGESTIONS WITH RESPECT THERETO

INTRODUCTION

There are some provisions in the laws of Missouri that are altogether, as I believe, contrary to the commercial spirit of the age, and the policy of the leading states of the Union, and therefore must sooner or later prove detrimental to Missouri, if they have not already done so, and especially to the best interests of its cities, and it should be an axiom that the commercial and agricultural interests of a state are so indissoluble, and mutually dependent, that each must ultimately suffer from an injury to the other. Therefore, if in the facts hereinafter stated, and in the suggestions that follow, the situation pictured is that of commerce, rather than of agriculture, both the facts and suggestions should be considered as vital, in the end, to the best interests of both the city and country life of the State.

ADMINISTRATION UPON ESTATES

One provision of our laws, which is contrary to the laws, I believe, of New York and Massachusetts, and probably to those of other commercially important states, is that which requires administration upon the property in Missouri of a non-resident. The last Missouri case, and the one that seemingly settles the law of this state on this point, is *Troll v. Third National Bank*, 211 S. W. 545, decided by your Supreme Court April 7, 1919.

Under this decision a Missouri corporation dare not transfer a share of stock on the endorsement of a foreign executor, or administrator, nor can any amount, whether large or small, due the estate of a non-resident creditor be safely paid by a resident of Missouri to any other than a Missouri executor or administrator.

If the law in all the states is as it has been declared to be in Missouri, and the residents of the several states stood on their rights, that is, required that a payment of a debt should give them a full acquittance for the debt, as may justly be insisted upon, few wholesale merchants, doing business as individuals, and not through corporations, would escape bankruptcy in the collection and settlement of their estate after death.

The laws of New York provide, as I understand, that payment to a foreign administrator may be made after certain statements have been submitted by such administrator to the State Treasurer, and any taxes due have been paid. Furthermore, if administration on the New York

property of a non-resident is necessary the administrator at the domicile of the deceased is eligible for appointment as administrator in New York. Other states possibly have similar laws, and probably few of them are as benighted as Missouri with respect to the estate of deceased non-residents. One immediate effect of our law is to give some fees to a few administrators, but sooner or later, that is, as soon as our administration laws become better known to non-residents they will discourage investments by non-residents in Missouri stocks, and other properties, and will drive out or keep out much foreign capital.

The non-resident owners of stocks in Missouri corporations, and other property in this State, probably largely outnumber Missouri creditors of such non-residents and therefore even if the policy of the law as to the administration in Missouri on the property of non-residents is to be determined by the number of Missouri creditors, or the amount of their claims, as compared with the number of non-resident owners of Missouri stocks or other properties, and the value of their holdings, the non-resident owners of such properties should be favored, if the resident creditors and non-resident debtors alone are considered, for it is much cheaper and easier to prove a claim in another state than to administer on the property of a non-resident in this state; while if the public policy of the situation is considered it is certainly best to require a resident creditor to prove his claim at the late domicile of a deceased debtor, rather than to require administration in Missouri on his property in this state, for such requirement certainly militates against Missouri enterprises commanding foreign capital.

INHERITANCE TAXES

Section 11 of the Missouri Inheritance Tax Law of 1917, provides:

"If a foreign executor, administrator or trustee shall assign or transfer any stock or obligation in this state standing in the name of the decedent or in trust for decedent liable for any such tax, the tax shall be paid to the State Treasurer on the transfer thereof."

This statute cannot be considered as changing the law as declared by our Supreme Court in *Troll v. Third National Bank*, but the law as declared in that case could be changed and made, as I believe, much like that of New York, by amending Section 11 of the Inheritance Tax Act so as to read:

A foreign executor, administrator, or trustee, may assign or transfer any stock, or obligation in this state standing in the name of a decedent, or in trust for a decedent, and may demand, sue for, receive and collect all other prop-

erty of a decedent, or held in trust for him, if any inheritance, succession, or other tax to which such stock, or other property is liable, shall be paid to the State Treasurer on the transfer or receipt thereof.

Why not amend Section 6 of this Inheritance Tax Act so as to extend the time for payment of inheritance taxes without interest from six to twelve months? Section 6 of the United States War Revenue Act of 1918 provides that an estate shall have a year in which to pay an inheritance tax without interest, and an extension of the time for payment of the tax may be granted for eighteen months without interest, and for a longer period with interest at the rate of six per cent, beginning one year from the death of the decedent.

In most cases stocks must be sold in order to pay inheritance taxes due from an estate, and to sell in a short time all that may be necessary to raise the required tax may depreciate the security, and require a sale on a falling market.

Another objectionable provision of our Inheritance Tax Act is the tax levied on charitable bequests. Section 4 of this Act of 1917 (page 117, Acts 1917), even as amended by the Act of 1919 (Acts 1919, page 722), taxes all bequests "for religious, charitable or educational purposes" unless used solely in Missouri. That is, under our laws bequests, even to help christianize a savage people, further the cure of tuberculosis, leprosy, or for other appealing work, if conducted beyond the confines of Missouri, is taxed. Truly our laws seem to demand that with us charity shall begin at home—and stay there.

It should require no argument to procure all possible ameliorations of provisions in our inheritance and administration laws, which bear heavily on most estates, and our widows and orphans especially, since the husband and father is usually the income earner of the family. And the law might, it seems to me, allow without taxation a bequest of more than \$100.00 to a friend or faithful servant.

INCOME TAX

Another matter that should receive attention is taxation of incomes.

Under present laws there is not only a local and state annual tax on the value of property, but also in many cases three income taxes, and a like number when the property passes by bequest or inheritance. These three taxes are:

FIRST: Federal;

SECOND: Tax by the state in which the owner of the property resides, and

THIRD: Tax by the state in which the property is situated, if such state is not that in which the owner resides.

Corporations are considered as resident of or located in, the state in which they have been incorporated. Let these taxes, inheritances and income taxes, be thus illustrated:

If a resident of Missouri owns real estate in New York, he pays a tax on the income therefrom to the Federal Government, to the State of New York, and to the State of Missouri, if the income is of a taxable amount, and like taxes when this property passes by decedent or devise on his death.

Inheritance taxes are similarly assessed on stocks owned by a Missourian in corporations organized under the laws of other states, and such taxes are exacted by Missouri, other states, and the Federal Government, on Missouri properties owned by non-residents.

Our state income and inheritance tax laws are largely blind copies of laws adopted by Congress, and a provision in the latter calculated to tax the income of a foreigner from American property—a single tax on such property—when blindly copied by the states, may impose two state income and inheritance taxes, in addition to the Federal tax, on American citizens.

A little figuring will show that the annual state tax levied on the corpus of a property, plus the Federal income tax and possibly another state income tax, takes a large per cent of an income.

It may be that present conditions are such that no remedial legislation, however just and desirable, is now possible; but the subject is of such importance that it should be kept materially in mind, and the corrective amendments of the tax laws adopted at as near a date as is possible, and to this end our lawmakers, who must move in the matter if changes in these laws are to be secured, should inform themselves.

TAXATION ON INCOMES FROM INTERSTATE COMMERCE

Some nice questions have arisen as to the power of the several states to tax incomes which are the result of interstate commerce, but it is needless to examine these questions now, further than to say that the matter has lately been under consideration in several cases by the U. S. Supreme Court, which has made a distinction, so far as taxation by the states is concerned, between the net and gross income derived from interstate commerce, the court holding that such net, but not gross, income may be taxed by the states.

Crew Levick Co. v. Pennsylvania, 245 U. S. 292.

Cudahy Packing Co. v. Minnesota, 246 U. S. 450.

U. S. Glue Co. v. Town of Oak Creek, 247 U. S. 321.

FOREIGN CORPORATIONS

In 1864 an act was passed limiting the capital of business corporations incorporated under the laws of Missouri to \$2,000,000.00. (See R. S. 1865, page 368.)

In 1879 this limit was raised to \$10,000,000.00.

In 1899 (Acts 1899, page 130) an act was passed providing that if a foreign corporation could not be incorporated under the laws of Missouri, it could not be licensed to do business in the State. That is, under the letter of this law, a foreign business corporation could not be licensed to do business in Missouri, if it had a capital of more than \$10,000,000.00 and did not have at least one citizen of Missouri on its board of directors.

In 1903 (Acts 1903, page 124) the number of Missouri citizens necessary on the board of directors of a Missouri corporation was raised from one to three.

This requirement as to the citizenship of directors of Missouri corporations was so onerous that it has been ignored, as had been the requirement of one Missouri director under the law of 1899, and the limitation on the licensing of foreign corporations in Missouri has been by common consent construed to apply to its capital stock only. But any day some court, on the petition of some stupid person, or rival of a foreign corporation licensed to do business in Missouri, may decree a forfeiture of the license and drive out of the state all foreign corporations which have not at least three Missourians on their boards. Is not this startling? And yet, such would be the result, if the prohibition in question is construed literally, as it may be.

Of course, it is possible that our courts, following the labored ten page reasoning of our Supreme Court in *State ex rel. Standard Tank Car Company v. Sullivan*, 221 S. W. R., page 728, which involved the licensing in Missouri of a foreign corporation having stock without a par value, may rule that the prohibition does not exclude corporations without at least three Missouri directors. But why have a law drawn in such terms as makes it possible for a ruling that would play thunder (or worse) with hundreds of useful corporations, and thousands upon thousands of their employes, as well as seriously interfere with important financial and public interests?

I cannot but believe this provision of our laws with respect to Missouri directors in foreign corporations, if it is to be construed literally, has been left in our laws thoughtlessly. If it is insisted upon, many, if not most, foreign corporations will close their offices in Missouri and sell us from Chicago, Indianapolis, Cincinnati, Louisville and Omaha. St. Louis and Kansas City are two of the best geographically located cities in the Union—and they are the Missouri cities in which

most foreign corporations licensed in this state have offices, but neither of these cities, nor the State of Missouri, can assume a "big business be damned" attitude and must bid for most of what they get commercially or industrially.

In 1907 (R. S. 1909, Sec. 3347, Acts 1907, page 166) the \$10,000,000.00 capital stock limit on Missouri corporations was raised to \$50,000,000.00 and the same time (R. S. 1909, Sec. 3343, Acts 1907, page 168) it was provided that if a foreign corporation was otherwise qualified to engage in business in this state it might be licensed though its capital exceeded \$10,000,000.00, provided it did not invest in Missouri, more than Missouri corporations were permitted to be capitalized for. That is, a foreign corporation may be licensed to do business in Missouri, if it does not invest more than \$50,000,000.00 in the state. Just here it is pertinent to remark that when the town of Pullman was established, it was stated in the newspapers that St. Louis was under consideration as the site for the company's works; but it would have been then impossible for it to locate in Missouri, because the Pullman Company had a capital stock of more than \$10,000,000.00 and unless the law had been changed, many corporations incorporated in other states, and now doing business in Missouri, and essential to its best interests, would have been denied admission to our state.

The fact that with a \$50,000,000.00 investment limitation the law in question may not be a deterrent influence with many corporations is no answer to an objection to the law; because it evidences a policy of the state that does us no good, and may be harmful. It does no good, because the refusal to a foreign corporation of a license to do business in Missouri does not prevent it from competing with our domestic enterprises, but does prevent it from investing in the state as it otherwise might, and employing our citizens.

Therefore this query: If the great commercial states of our Union have no such limitations, why should we have them? We who are in the very center of a country with the grandest commercial possibilities in the history of the world now opening to it.

NOTES TO UNLICENSED FOREIGN CORPORATIONS

Speaking of foreign corporations, it will no doubt startle most Missouri bankers to learn that a note given to an unlicensed foreign corporation in Missouri on account of business done by it in this state (other than interstate or foreign commerce) is void, even in the hands of an innocent endorsee. But such was the decision by the St. Louis Court of Appeals February 4, 1919, in the case of *German-American Bank v. Smith*, 108 S. W. R., page 878.

This decision is based on several decisions of the Kansas City Court

of Appeals and our Supreme Court, which are cited, and the New Hampshire Supreme Court has given a like decision.

Therefore, it behooves every one accepting as a payee, or endorsee, the note of a corporation organized under the laws of a state or country other than Missouri, to satisfy himself at his peril that the corporation is licensed to do business in Missouri, or that the transaction represented by the note was interstate or foreign commerce and not intrastate business.

The rule in question may work both ways. That is, if a note given under the circumstances stated to a foreign corporation is void, and therefore cannot be recovered on, even by an innocent holder, a note given by such corporation under like conditions, should, it would seem, also be void.

A note, though obtained by fraud, may be recovered on by an innocent holder who acquired it before maturity for value (*Downs v. Horton*, 209 S. W. 595, Feby. 25, 1919); but not so, as we have just seen, when a note is given to a foreign corporation under the conditions set forth in the cases just cited, nor possibly, when given by such corporation.

If the rule declared in the case referred to (*Bank v. Smith*) holds with respect to notes given by a non-licensed foreign corporation, the people of Missouri may be heavily penalized for dealing with such corporations, however innocently, by being refused judgment on their notes.

The fact that the laws of some of the other states may be as harsh and dangerous as ours with respect to the notes of unlicensed foreign corporations should not be considered as justifying our law; but should rather be regarded as giving us a chance to happily distinguish ourselves by beating them to an amendment of the law.

CONCLUSION

The census just finished shows that in some seventy counties of Missouri the population is less than it was in 1910; and in the past ten years the whole state has increased in population only 3.3 per cent. Furthermore, since 1900 the state has fallen from fifth place in population to ninth, while St. Louis has fallen from fourth place amongst cities to fifth or sixth place, though it is the most centrally located important city of the Union, and is the center of a country which within a radius of 300 miles has more people, the best soil, more varied resources, richer agricultural lands, and the best all-year-around climate of any area within a like radius around any other large city in the United States.

Should not these facts but our loss of rank, nevertheless, make us "Stop, Look and Listen"?

Many millions of dollars are about to be spent to give Chicago and other lake cities an all-water route via St. Louis to New Orleans. This route should mean more for St. Louis than for Chicago and other lake cities; and as much for Missouri as for Illinois. Therefore, should we not get ready to avail ourselves of the advantages this river route will give us? That is, should we not encourage "big business" and prepare to handle it? How can we better do this than by making our laws as favorable to commercial enterprises, and as attractive to non-resident investors, as are the laws of any state in the Union, and especially as attractive as those of our biggest commercial states?

"Big Business" means bigness in everything—men employed, wages paid, opportunities for work, raw materials bought, desirability in every particular, and undesirableness in none. Our denial of opportunities for "Big Business" means that it will set itself up elsewhere, and not that we can kill it, or not pay tribute to it. Other cities and other states will welcome it, and Missourians will become contributors to its greatness, but not sharers therein—that is, "hewers of wood and drawers of water" for it.

Should it be necessary to say more to induce our lawmakers to study our laws with the desire to make them at least as encouraging to business, big and little, as are the laws of any other state? Have Delaware, West Virginia or New Jersey, lost anything by their liberal corporation laws? Or have we gained anything by our narrow corporation and administration laws, except an occasional administrator's fee to some one who administers on the estate of a non-resident, but which will presently keep non-residents from investing in Missouri property, or corporations.¹

GEORGE R. LOCKWOOD.

St. Louis, Missouri.

¹This article was issued in pamphlet form prior to the meeting of regular session of the General Assembly. Perhaps some changes were made in the statutes as suggested. At this time a copy of the session acts is not available.—Ed.

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BAR BULLETIN

TRANSFER OF PROPERTY BY A PLEDGEE

BY

JAMES LEWIS PARKS

NOTES ON RECENT MISSOURI CASES



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Transfer of Property By a Pledgee

In certain communities, personal property of one kind or another is frequently deposited by way of pledge or pawn to secure performance of an obligation. The question as to the rights of the pledgee in the property, both before and after the maturity of the debt, is of importance and the results flowing from an improper and illegal transfer of the property by the pledgee are often complicated. It is accordingly proposed, in the following pages, to consider transactions involving transfers of the property by the pledgee and to endeavor to formulate the rules, which regulate his rights and obligations in this respect.

According to Story's definition, which has been universally accepted, a pledge or pawn is "a bailment of personal property as security for some debt or engagement."¹ The pledgee therefore has no title to the property deposited but merely the possession thereof, the general title remaining in the pledgor; but the pledgee has a possessory interest in the chattel to the extent of his debt, which amounts to a lien.² In the case of the ordinary bailment, the bailee's lien, according to the old common law, was only a personal right and if he transferred the possession of the chattel, except to a third party to be held in turn for him in bail, he lost his lien. This was so even though the transfer did not involve any element of conversion but was intended to operate only as an assignment of the debt and lien.³ The surrender of

1. Story, *Bailments*, 9th Ed. sec. 286. See also *Tennent v. Ins. Co.* (1908) 112 S. W. 754.

2. *Williams v. Rorer* (1842) 7 Mo. 556; *Donald v. Suckling* (1866) L. R.—1 Q. B. 585; *Halliday v. Holgate* (1868) L. R.—3 Ex. 299. See also *Milliken-Helm Co. v. Albers* (1912) 244 Mo. 38, 147 S. W. 1065; *Bank v. Totten* (1905) 114 Mo. App. 97, 89 S. W. 65.

3. *Ruggles v. Walker* (1861) 34 Vt. 468, *Contra*, *Goyena v. Berdoulay* (1915) 154 N. Y. S. 103. It is believed that the orthodox rule is unduly stringent and serves no reasonable purpose. As the debt today is concededly assignable everywhere, the security, incidental to the debt, and a part thereof might well also be held to pass with the debt, where an intention so to pass it on is found.

the possession of the chattel destroyed the lien. This, however, is not always the case with the pledgee for he is permitted to assign the debt and security.⁴ So too the pledgee can repledge the chattel but for no longer time or greater amount than it was pledged to him for.⁵ Apparently then in the matter of disposing of his interest to a third party, the pledgee can freely do so, so long as the act of transfer does not involve on his part an assertion of a right in the chattel greater than he was given by the contract of pledge. To this extent at least, the right of the pledgee is not only a personal right, but is in result assimilated to a property interest in the goods. This should be the case, for, if the debt is assignable, then the security, which is intended to be incidental to the debt, ought also to be assignable, and if the pledgee has a possessory right, he ought to be able to transfer the same to any one that he may please if only the disposition does not involve a denial of the pledgor's general property right and does not interfere with the latter's right of redemption.⁶

It has been held that a pledgee may also deliver the possession of the goods to the pledgor without losing his lien if

4. *Belden v. Perkins* (1875) 78 Ill. 449; *Drake v. Cloonan* (1894) 99 Mich. 121, 57 N. W. 1098; *Waddle v. Owen* (1895) 43 Neb. 489, 61 N. W. 731; *Chapman v. Brooks* (1865) 31 N. Y. 75.

5. *Donald v. Suckling*, *supra*, note 2 (*dictum*); *Meyer v. Moss* (1902) 110 La. 132; 34 So. 332; *Coleman v. Anderson* (1904) 82 S. W. (Tex.) 1057 (*dictum*); *Drake v. Cloonan*, *supra*, note 4 (*dictum*). Of course, the pledgee of the pledgee would acquire as security only the rights in the property that the original pledgee had.

6. "It appears that the pawnee may deliver the goods to a stranger without consideration, or he may sell and assign his interest absolutely, or he may assign it conditionally by way of pawn without, in either case, destroying the original lien, or giving to the owner a right to reclaim them on any other or better terms than he could have done before such delivery or assignment." *Jarvis v. Rogers* (1819) 15 Mass. 1. c. 408. If the right were merely personal, none of the above mentioned things could have been done. If, however, the decisions had held the other way they would not have been beyond reason. In *Donald v. Suckling* (1866) L. R. 1 Q. B. 1. c. 618, Cockburn, C. J., said: "I think it unnecessary to

they are delivered in bailment for a special purpose. This has been done and the lien sustained.⁷ Under these conditions, it is said that "the possession (of the pledgor) is perfectly consis-

the decision in the present case to determine whether a party, with whom an article has been pledged**** has a right to transfer his interest*****. I should certainly hesitate to lay down the affirmative of that proposition. Such a right in the pawnee seems quite inconsistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately on the tender of the amount for which the pledge was given. In some instances it may well be inferred from the nature of the thing pledged *** that the pawnor, though perfectly willing that the article should be entrusted to the custody of the pawnee, would not have parted with it on the terms that it should be passed on to others and committed to the custody of strangers." The notion of the Chief Justice, however, has not prevailed. But the *dictum* raises two important questions (to be dealt with *infra*), a transfer of the pledge being permissible: (1) to whom must the pledgor make tender at the maturity of the debt, and (2) if the pledged property be injured, or converted by the transferee against whom may the pledgor proceed?

7. *Wilkinson v Misner* (1911) 158 Mo. App. 551, 138 S. W. 931. In this case the pledgee returned the pledged property to the pledgor for the purpose of realizing a portion of the debt secured through a sale if it could be arranged. It was held that the lien was not destroyed by such a surrender of the property to the pledgor, but the question arose between the parties. *Bank v. Trust Co.* (1909) 135 Mo. App. 366, 115 S. W. 1071 holds the pledgee's lien good as against creditors of the pledgor where the property was left by the pledgee in the hands of an agent of the pledgor, who agreed to keep the property for the pledgee. The case is of course distinguishable from those under discussion because it can be said that the possession of the agent is not the possession of the pledgor, the former as to this particular transaction not acting as the agent of the latter. *Leahy v. Simpson* (1894) 60 Mo. App. 83 (dispute between parties). See also *Bank v. Pierce* (1919) 280 Mo. 614, 219 S. W. 578; *Palmtag v. Doutrick* (1881) 59 Cal. 154; *Thayer v. Dwight* (1870) 104 Mass. 254; *Macauley v. Macauley* (1885) 35 Hun. (N. Y.) 556, *Contra*, *Bodenhammer v. Newsom* (1857) 5 Jones (N. C.) 107, holding that the lien would not be sustained as against an innocent person dealing with the pledgor believing, because of the pledgor's possession, that the latter was the owner of the property. The court in this case holds the pledgee estopped to assert his lien. Obviously if the pledgee delivers back possession of the pledge to the pledgor without any agreement with respect

tent with the original right of the pledgee.”⁸ The pledgor is here holding the goods not in his own right but in subservience to the pledgee’s special possessory interest. On the other hand, if the chattels are given to the pledgor in bailment for general use, the courts will not sustain the pledgee’s lien as against innocent purchasers from and creditors of the pledgor, even though there has been a special agreement between the parties for the preservation of the lien.⁹ Probably, too, the lien would not be sustained even as against the pledgor under these conditions.¹⁰ It is usually said that the reason for holding the lien invalid under these facts is because the essence of the lien is the retention of the property over which it exists. If, therefore, the

to the lien, it is gone. The pledgee’s conduct under such conditions is a waiver of the lien. *Bank v. Bradshaw* (1912) 91 Neb. 210, 135 N. W. 830.

In the case of an ordinary bailment, the rule at the common law was that if the bailee parted with possession of the property to the bailor, his lien was lost under all conditions. “The very definition of the word lien as ‘the right to retain’ indicates that it must cease when possession is relinquished.” *McFarland v. Wheeler* (1841) 26 Wend. (N. Y.) 467, p. 473.

Occasionally the pledgee has given the *custody* of the property to the pledgor. The property has not been bailed with the pledgor, but has been loaned or entrusted to the pledgor as the borrower or the servant of the pledgee. In such cases it is clear that the lien should not be lost and the authority is in *accord*. The possession of the borrower or servant is that of the lender or master. *Reeves v. Capper* (1838) 5 Bing. New Cas. 136; *Clare v. Agerter* (1892) 47 Kan. 604, 28 Pac. 694. See generally as to the distinction between custody and possession, Pollock and Wright, *Possession in the Common Law*, p. 138 *et seq.*

8. *Palmtag v. Doutrick*, *supra*, note 7, 59 Cal. 1. c. 159.

9. *Colby v. Cressy* (1830) 5 N. H. 237; *Walker v. Staples* (1862) 87 Mass. 34; *Gamson v. Pritchard* (1911) 210 Mass. 296, 96 N. E. 715 (*dictum*); *Jackson v. Kincaid* (1896) 4 Okla. 554, 46 Pac. 587; (statute) *Fletcher v. Howard* (1826) 2 Aikens (Vt.) 115, 16 Am. Dec. 686.

10. The cases often suggest that the lien would not be sustained under these conditions, probably because of the notion which the courts have and repeatedly state although usually *obiter*, that a pledgee’s lien is only a personal right to retain possession. This was undoubtedly the conception which the courts had as to the lien of the ordinary bailee (see *supra* note 7) and it was natural and easy to carry over this idea when it came to dealing with the lien of a pledgee. It is believed that this conception is

property is not retained, the lien must be gone.¹¹ If this is the real reason for the rule, it is difficult to understand how the lien in cases of special limited bailments with the pledgor can be sustained, because in that case the pledgee does not keep the possession of the chattels. But perhaps cases of so called special bailments may be considered as cases of custody, and so reconciled with and distinguished from those now under consideration.^{11a} Unless, however, such a distinction can be made it is

unfortunate and that the actual decisions do not of necessity support the proposition. See *infra* note 11, and text in connection therewith. But see *dictum* in *McFarland v. Wheeler*, 26 Wendell 1. c. 481. "Such ** lien may be continued ** so far as the parties are concerned even after the actual possession has been parted with; but not to the prejudice of general creditors **." The *dictum* is the *obiter* opinion of Chancellor Walworth. See also *Staples v. Simpson* (1894) 60 Mo. App. 73.

11. In *Chitwood v. Zinc Co.* (1902) 93 Mo. App. 225. C was indebted to plaintiff. C had a mining lease and some ore on the premises. C verbally authorized plaintiff to look to the ore for the satisfaction of his debt, to which plaintiff assented. C thereafter and before plaintiff took possession of the ore, sold and assigned his lease to defendant, who bought with knowledge of the plaintiff's agreement with respect to the ore. Defendant then sold the ore, and plaintiff sued in trover. It was held that the action would not lie, as plaintiff was not a pledgee, never having had possession of the ore. Probably there never had been a delivery of the ore to the plaintiff, either actual or constructive, and for this reason the relation of pledgor and pledgee never existed. But if there had been a delivery of the ore, then the case might have held that the pledgee had lost his lien because of C's possession of the ore.

McFarland v. Wheeler, *supra*, note 7, 26 Wendell 467 (*dictum*). "Continuance in possession is indispensable to the right of a lien; an abandonment of the custody *** frustrates any power to retain (i. e. the chattels) and operates as an absolute waiver of the lien." *Walker v. Staples* (1862) 87 Mass. 34, p. 35. "Indeed possession may be considered as the very essence of a pledge *** and if possession be once given up, the pledge as such is extinguished." *Casey v. Cavaroc* (1877) 96 U. S. 1. c. 477. In the last two cited cases, the question as to the validity of the lien was between the pledgee and an innocent person claiming under the pledgor, and the pledgor had been placed in possession of the goods by the pledgee not for special purposes.

11a. See *supra* note 7.

not perceived how the cases can be reconciled. In fact if the pledgee's right is merely a right to retain, all cases where he parts with the possession of the goods, except for purposes of enforcing his lien, ought to result in the loss of the lien. However, as has been shown, this is not the result, and so it cannot be said that the lien is a right solely to retain, dependent for its existence on actual and continued possession of the goods. There are too many cases holding the lien valid where there is no possession in the pledgee. The proper basis for the decision to the effect that the lien is gone if the property is returned to the pledgor for general use, is that the pledgor's possession clothes him with apparent ownership of the goods, and because of this fact makes fraud on creditors of and innocent purchasers from the pledgor too easy. The law has never favored secret liens.¹² If the lien is declared invalid on this ground, all of the cases are easily reconciled, and we are not forced to say what is not so, namely, that the pledgee's right is merely one to retain possession of the pledged property. Furthermore, if this is the reason for refusing to sanction the lien, it could be said with perfect propriety and consistency that the lien would be good in favor of the pledgee as against the pledgor, and until rights of a *bona fide* purchaser or creditor have intervened. In other words, if the pledgee is not estopped to assert the lien he can do so, and he will not be estopped until some one has taken the goods from the

12. In *Valley Bank v. Frank* (1882) 12 Mo. App. 460 it was held that an innocent purchaser has a better equity than he who having advanced money on part of a stock in trade, leaves it in the possession of the original owner. But there was no pledge in the case as there had never been any delivery of the property to the intended pledgee, whatsoever. See also *Roeder Bros. v. Brewery Co.* (1888) 33 Mo. App. 69. Both of the last cited cases deal with the general problem under discussion.

"The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception, for if the debtor remains in possession the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods." *Casey v. Cavaroc*, *supra*, note 11, 96 U. S. 1. c. 490. See also *Moors v. Reading* (1897) 167 Mass. 322, 45 N. E. 760, and Glenn, *Creditor's Rights*, chap. XI.

pledgor, reasonably assuming that the latter's possession signified ownership. The grounds for such a decision would not be that the pledgee has no possessory right, but that it would not be just to assert his right to security against an innocent buyer from the pledgor or the latter's creditor. Even though the law might not be willing to give the pledgee a lien against the pledgor, when possession of the goods has been given to the latter, it could still so refuse to do without holding that the pledgee's right is gone because the right depends on continued possession. It could be held as a matter of policy that no right ought to remain in the pledgee under these conditions because of the ever present danger of fraud to third parties. Such a holding would reach a result possibly to be desired, and at the same time would obviate the confusion that is bound to arise in other cases, if it is stated that the pledgee's interest is a purely personal one.

Wherever the transfer of the pledged property by the pledgee to a third party is actually and expressly made and is legal, there is no difficulty in determining the rights resulting; but occasionally the pledgee does not transfer the property but merely the debt, and the question then is whether the assignment of the debt operates to carry with it to the assignee the security as well. It is not possible to hold that the assignment gives a legal title to the pledge to the assignee, for there has been no delivery of the chattel, actual or symbolical, and that is always essential if a possessory interest is being transferred. Still, it might be held that the assignee in equity ought to have a right to use the chattel, if he desires to avail himself of such security. The assignor could be said to be the trustee with respect to the security for the assignee and there is authority for such a rule.¹³ It has, however, been held *contra* to this, it being said that in

13. *Holland etc. Co. v. See* (1910) 146 Mo. App. 269, 130 S. W. 354; (pledgee of a secured obligation held entitled to security, which secured his pledge; the security was a deed of trust.) *Hawkins v. Bank* (1897) 150 Ind. 117, 49 N. E. 957. *Ramboz v. Stansbury* (1910) 110 Pac. 472, 13 Cal. A. 649; *Perry v. Parrott* (1901) 67 Pac. (Cal.) 144. See also *Ware Murphy and Co. v. Russell* (1876) 57 Ala. 43. In the case last cited the

the absence of an express agreement giving the assignee the benefit of the pledge, these equitable rights ought not to pass.¹⁴ It is a question of whether or not a court is inclined to the belief that the assignor intended to give the assignee, as a result of the transfer of the debt, all rights with respect to its collection that he had. An affirmative answer to this question would not seem to be stretching one's imagination and accordingly it is urged that a decision which, by implication, gives the assignee of the debt the right to the security as well is sound and just.

Whenever the pledgee transfers his rights in the debt and the security to a third party it becomes necessary to determine the rights and obligations of the pledgor on the maturity of the debt and how he will entitle himself to regain possession of the pledged chattel. At an early date it was suggested that the pledgor could not be required to pay the debt to a person other than the original pledgor because he had never agreed to do so¹⁵ but this *dictum* has not been followed; and the cases hold that in the event of the transfer of the debt and the security and notice being given to the pledgor of this fact, he must pay the assignee and cannot claim the property free from the lien unless he makes due tender to the latter.¹⁶ Such a rule only carries out the ordinary rule in the matter of assignments. The debtor must always, on notice being given to him of the assignment, respect the rights of the assignee. Of course, if the debtor should happen to pay the debt in good faith to the pledgee, not knowing of the assignment, then he ought to be able to claim and regain the pledged property from the assignee without offering to pay the debt, for the burden is on the assignee to bring home notice to the

court held that the security would follow the debt but did not go into the question of whether the assignment would be an equitable one or would amount to a legal assignment of title.

14. *Johnson v. Smith* (1850) 11 Hump. (Tenn.) 396.

15. *Donald v. Suckling*, *supra*, note 6.

16. *Talty v. Freedman's etc. Trust Co.* (1876) 93 U. S. 321, 23 L. Ed. 886; *Bradley v. Parks* (1876) 83 Ill. 169; *Goss v. Emerson* (1851) 23 N. H. 38, holds that the pledgee's interest is assignable, not dealing, however, with the matter of tender.

pledgor of the assignment.¹⁷ It is difficult, however, to conceive of the last suggested case ever actually arising because, as a rule, the pledgor when he makes tender will demand a return of the pledge, and if it is not returned to him, he will usually receive sufficient information from the pledgee as to its whereabouts to put him on inquiry as to whether or not there has not been an assignment of the debt. If the pledgor were thus on inquiry, he ought to be held to pay the pledgee at his peril.¹⁸

It will sometimes happen that the pledgee will transfer his interest in the debt and the pledge to a third party legally and an injury to, or a conversion of, the property will occur after the transfer. There is no question but that the pledgor could, if he so desired, sue the assignee and recover.^{18a} The assignee should take the property subject to the burdens and the pledgor's general property right therein. The assignee would be equally obligated with respect to the safekeeping and the return of the property. Perhaps, however, the pledgor would prefer to sue the pledgee; perhaps an action against the latter would be more profitable and worth while. What little authority there is dealing with this problem holds that the pledgor, after the pledgee has legally passed the pledge on to another, cannot hold the pledgee to any of his original obligations as to the property. It is said that the pledgee may legally part with the debt and with his pos-

17. Williston on Contracts, sec. 413 and 433.

18. It might well be said that the debtor would be on inquiry and so have notice from the very fact that the pledgee did not offer to return the pledged property on the tender of the debt. This fact should indicate to the pledgor that the property might possibly be in the hands of some person other than the pledgee, claiming a right under the latter.

18a. The cases rather assume this proposition than decide it. But see *Dibert v. D'Arcy* (1912) 248 Mo. 1. c. 651, 154 S. W. 1116, where the court said: "The assignment of the notes and bonds to the syndicate placed it squarely in the shoes of the bank (the pledgee) with respect to the entire transaction. It not only became the owner of the debt, but the trustee and agent of the pledgor with respect to the collaterals (the bonds assigned)." See also *Chouteau v. Allen* (1879) 70 Mo. 290; *Bank v. Davis* (1901) 113 Ga. 341, 38 S. E. 836; *Taggart v. Packard* (1867) 39 Vt. 628.

session of the property and interest therein and when he does, his transferee is substituted in his place. A pledgee "cannot be charged with the wrongful act of another over which he had no control. A mortgagee might as well be held liable for the destruction of the mortgaged property after he had parted with all his interest by a valid assignment."^{18b} It would seem that the logical and proper result is reached in this case. After all the pledgor must be taken as knowing that the debt is assignable; that with it may go the pledged property, and that as a result of an assignment the pledgee will step out of the transaction altogether.

A pledgee has occasionally attempted to pass the pledged property without the debt, retaining the right to collect the latter himself. It has been held, under these conditions, that the transferee of the property gets nothing and that the lien cannot in this way be severed from the debt. The only justification for the existence of the lien is the fact that it is security for the debt, which is the principal thing. Accordingly it is entirely right to hold that an attempted assignment of the lien without the debt is a nullity, serving to vest no rights in the transferee whatsoever.^{18c} It would seem to follow too that, even though the pledgee has

18b. *Goss v. Emerson* (1851) 23 N. H. 1. c. 43. In the last case cited the debt secured was negotiable. In *Bank v. Davis*, *supra*, note 18a, it was held *accord*, but the court suggested that if the debt was not negotiable and the pledgee's successor had converted the property that the pledgee would also be liable for this act. The court seemed to incline to the opinion that the pledgee whose debt is negotiable is licensed to freely pass the pledge to another, and escape his liabilities, whereas the pledgee of a non-negotiable debt would not be free to do so. It is to be noted, however, that this is not the underlying theory of *Goss v. Emerson*, *supra*. The court, in that case, based its decision on the fact that the pledgee has an alienable interest in the property, which he could pass on and "wash his hands of," and likens his position to that of the mortgagee who parts with his interest in the mortgaged goods. In any event the distinction would not seem to be well taken, for non-negotiable choses must be regarded today as being freely assignable if not freely "alienable." But see Cockburn, C. J., in *Donald v. Suckling*, *supra*, note 6.

18c. *Easton v. Hodges* (1883) 18 Fed. 677 (*dictum*); *Van Eman v.*

not passed the lien to his transferee, his attempted transfer ought to destroy his own right to the security. While it is true that the assignment or grant was not effective in the way desired, still at least it did show that the lien was not desired by the pledgee any longer as security, and this fact, coupled with the actual giving up of the possession of the property, ought to end the lien altogether. After the pledgee has abandoned his right, he ought not to be heard to say that this right is revived in his favor just because he was unable to carry out his original intent with respect to the transfer.

If the pledgee passes the property to another, and the transaction involves the assertion of a greater right in the property on his part than he legally has, the transfer and disposition is illegal. This is the result if the pledgee disposes of the property as his own;¹⁹ or if he pledges the property to secure a debt greater in amount than that secured to him;²⁰ or, it would seem, if he pledges the property for no greater amount, but for a longer period of time than it was pledged to him; or if he improperly exercises his power of sale to satisfy the debt.²¹ In all of these

Stanchfield (1867) 13 Minn. 1. c. 75. See also *Dexter v. McClellan* (1897) 22 So. (Ala.) 461.

19. *Schaaf v. Fries* (1901) 90 Mo. App. 111 (*dictum*); *Wood v. Matthews* (1881) 73 Mo. 477; *Gay v. Moss* (1867) 34 Cal. 125; *Wilson v. Little* (1849) 2 N. Y. 443; *Lamb v. O'Reilly* (1895) 34 N. Y. Supp. 235; *Upham v. Barbour* (1896) 65 Minn. 364, 68 N. W. 42. In a case where the pledge is of shares of stock, the pledgee is not usually obligated to keep the specific shares, and there is no conversion if at all times the pledgee keeps in hand the same number of the same kind of shares as were pledged. *Berlin v. Eddy* (1863) 33 Mo. 426. But see *contra*, *Allen v. Dubois* (1898) 75 N. W. 443, 117 Mich. 115. (Identical shares must be returned.)

20. *Richardson v. Ashby* (1895) 132 Mo. 238, 33 S. W. 806; *Smith v. Savin* (1894) 141 N. Y. 315, 36 N. E. 338; *Work v. Bennett* (1872) 70 Pa. St. 484.

21. *Richardson v. Ashby* (1895) 132 Mo. 238, 33 S. W. 806; (*dictum*) *Greer v. Bank* (1895) 128 Mo. 559, 30 S. W. 319; *Dibert v. D'Arcy* (1912) 248 Mo. 617, 154 S. W. 1116; *Feige v. Burt* (1898) 118 Mich. 243, 77 N. W. 928; *Ainsworth v. Bowen* (1859) 9 Wisc. 348.

cases the question arises as to the rights of the pledgor both as against the pledgee and the latter's transferee.

If at the time of the transfer, the debt had been paid, the pledgor could recover of the pledgee the full value of the property,²² and this should be recoverable in an action sounding in conversion,²³ or the pledgor should be permitted to waive the tort and sue in assumpsit²⁴ for goods sold and delivered. A pledgor ought also to be able to sue in either one of these forms of action, if, at the time of the transfer, the debt had matured and he had duly tendered the amount thereof to the pledgee; but

22. *Hilgert v. Levin* (1897) 72 Mo. App. 48; (illegal debt secured) *Hyre v. Bank* (1892) 48 Mo. App. 434; *Smith v. Becker* (1916) 192 Mo. App. 597, 184 S. W. 943; *Southworth Co. v. Lamb* (1884) 82 Mo. 242; *August v. O'Brien* (1900) 63 N. Y. Supp. 989.

23. *Southworth Co. v. Lamb* (1884) 82 Mo. 242; *Jackson v. Shawl* (1865) 29 Cal. 267; *Hazard v. Loring* (1852) 10 Cush. (Mass.) 266; *Bryson v. Raynor* (1866) 25 Md. 424; (*dictum*) *Cass v. Higenbotam* (1885) 100 N. Y. 248, 3 N. E. 189.

24. *Whiting v. McDonald* (1790) 1 Root (Conn.) 444; *Bryson v. Raynor*, *supra*, note 23 (*dictum*). See also Woodward, Law of Quasi Contract, sec. 277. In *Sandeen v. Railroad Co.* (1883) 79 Mo. 278 it was held that a plaintiff could not confer jurisdiction on a justice court by waiving the tort for a conversion of property and suing for goods sold and delivered. There is, however, *dictum* in that case to the effect that assumpsit ought not to lie in a case of conversion. Said the court: "It is the extreme of fiction to impose the deliberation, solemnity, and obligation of a sale upon the actual facts of a highway robbery. And while there should be a redress for every wrong, the experience of the past has shown that this object will be most universally achieved by employing such forms of redress as the actual facts constituting the wrong in every case may suggest and call for. This doctrine of fiction is not in accord with the spirit and logic of our practice act, which require the pleader to set out the actual facts constituting his cause of action or defense." But see *Finlay v. Bryson* (1884) 84 Mo. 664 explaining the *Sandeen* case, *supra*, and limiting the decision to a holding that "the plaintiff will not be indulged in the fiction, if the effect of it is to give jurisdiction *** to a court, which otherwise would not possess it." Probably a plaintiff would be allowed to waive the tort and sue for goods sold and delivered in Missouri. See *Duncan v. Smith* (1920) 226 S. W. 621. And see *accord* with the general rule that the action will lie, *Redel*

in this case the amount of his recovery should be reduced by the amount of the debt with the interest thereon. The debt is held to be proper matter for recoupment.^{24a}

A pledgee may illegally transfer the property before the maturity of the debt, or, if it has matured, before a tender has been made or the debt paid. Under these states of facts the pledgor ought to be able to sue in case for the destruction of his general property right, and should recover the difference between the value of the property at the time of its appropriation and the amount of the debt, plus the interest allowable on the same. Such an amount would represent the value of his interest.^{24b} There would also appear to be no objection, under the assumed facts, if the pledgee's act of transfer was a sale to permit the pledgor to sue in assumpsit for money had and received, and to recover in such an action the difference between the amount that the pledgee had received on the sale of the pledge and the amount of the debt, with interest to the date of the sale. Everything in the way of value in the property in excess of the amount of the debt belongs to the pledgor. The law has been jealous of the pledgor's "equity" and zealous to safeguard and preserve it for him whenever possible. While the pledgee is permitted to hold the pledged property so long as the debt remains unpaid, and the pledgor usually ought not to be able to compel the form-

v. Stone Co. (1907) 126 Mo. App. 163, 103 S. W. 568; *Crane v. Murray* (1904) 106 Mo. App. 697, 80 S. W. 280; *Gordon v. Brunner* (1872) 49 Mo. 570.

24a. *Belden v. Perkins* (1875) 78 Ill. 449; *Baltimore etc. Co. v. Dalrymple* (1866) 25 Md. 269; *Farrar v. Paine* (1899) 173 Mass. 58, 53 N. E. 146; *Feige v. Burt* (1898) 118 Mich. 243, 77 N. W. 928; *Cropsey v. Averill* (1879) 8 Neb. 151. But see *contra*, *Ball v. Stanley* (1833) 5 Yerger (Tenn.) 199, 26 Am. Dec. 263, holding that the pledgee may not recoup the amount of his debt, but will have to bring another action to recover the same.

24b. *Nabring v. Bank* (1877) 58 Ala. 204. In this case the plaintiff had pledged shares in a corporation to the defendant, who had appropriated the same and sold them. It was held that if the defendant had transferred the shares to his own name perhaps trover would not lie but that case would for the destruction of the plaintiff's general property interest.

er to sell the pledge, and by so doing to realize for him the excess value of the property over and above the amount of the debt,^{24c} still if the pledgee does sell, it ought to be for the pledgor's account and anything in excess of the debt derived from the sale ought to be given to the pledgor. This being the duty of the pledgee, it might very well be said that the pledgor should be in a position, if the pledgee has tortiously sold the goods, to say that any money realized from the sale in excess of the debt was his and was received to his use. The only obstacle to such a contention by the pledgor would be the fact that the pledgee, when he sold the goods, did not intend to satisfy the debt; but the latter ought not to be allowed to make such a contention, because in order so to do he will have to explain that his sale was illegal and tortious. Of course, it might also be said, in a case where the sale happened before the maturity of the debt, that from the very nature of things it would be impossible to satisfy a debt not as yet due; but the only objection to accelerating the maturity of any obligation is that so doing may injure one of the parties by varying the terms of the bargain. The pledgee, however, is in no position to make an objection of this kind, as he has already appropriated the debtor's money. He should not be heard to say that he did this for any purpose other than the satisfaction of the debt. So far as the pledgor is concerned, he ought to have a choice either to say that there has or has not been satisfaction of the debt. No authority which permits the pledgor to sue under the assumed facts in assumpsit for money had and received has been found; but upon general principles, because of the fact that the pledgee has been unjustly enriched to this extent, the action should lie.²⁵ It seems needless to say, however, that if the pledg-

24c. But see *Bank v. Kilpatrick* (1907) 204 Mo. 119, 102 S. W. 499; *Cold Storage Co. v. Pitts* (1913) 176 Mo. App. 134, 167 S. W. 1182.

25. See Woodward, *Law of Quasi Contract*, sec. 273. See *Miles v. Walther* (1876) 3 Mo. App. 96, a case not in point but containing valuable discussion of the principle under consideration. See also same case in 5 Mo. App. 594 (memo.).

It has also been held that a pledgor may sue the pledgee for breach of the contract to safely keep and restore the pledged property. *Brown*

ee's act of transfer was not a sale the action for money had and received would not lie, for without a sale there has been no receipt of money by the pledgee at all.²⁶ If there were no sale, the pledgor's remedy would be in case, as above stated.

The question remains whether a pledgor may sue the pledgee in conversion if the pledgee has illegally transferred the property and the pledgor has neither paid nor tendered the amount of the debt? This question might be presented in a case where the pledgee made the transfer before the maturity of the obligation secured and the pledgor attempted to sue before that time, or in a case where the pledgee transferred the property, either before, or after, the maturity of the debt, but the pledgor was suing after such time. An easy way of disposing of the whole question and a way adopted by many cases is to say that when the pledgee wrongfully disposes of the property, that this act ends the bailment, destroys the lien, and entitles the pledgor to the immediate possession of the goods.²⁷ Under such a line of decisions all that a pledgor need show is the pledgee's act of transfer and the court will entertain the action, usually assessing the damages at the value of the goods at the time of the pledgee's wrongful act,²⁸ less the amount of the debt with interest thereon to the date of the judgment. Of course, the reasoning adopted

v. *Bank* (1904) 66 C. C. A. 293, 132 Fed. 450. The measure of damages in such an action would be the same as in case, or in assumpsit for money had and received.

26. Woodward, Law of Quasi Contract, sec. 273.

27. *Depuy v. Clark* (1859) 12 Ind. 427; *Baltimore etc. Co. v. Dalrymple* (1866) 25 Md. 269; *Cortelyou v. Lansing* (1805) 2 Cai. Cas. (N. Y.) 200; *Glidden v. Bank* (1895) 53 Ohio St. 588, 42 N. E. 995; (*dictum*) *Austin v. Vanderbilt* (1906) 48 Ore. 206, 85 Pac. 519; *Work v. Bennett* (1872) 70 Pa. S. 484. Would such an action lie before the maturity of the debt secured? According to the theory of the cases it would seem that it should.

28. Occasionally the courts have adopted as the proper measure of damages the highest intermediate value of the converted property between the time of its conversion and the date of the trial of the action. This rule for assessing damages, however, has usually been confined to cases where the property converted consisted of stocks or bonds, or some

in these cases dispenses with the necessity of tender, and, because the bailment is at an end would permit the pledgor to sue for the conversion of the goods even before the maturity of the debt.²⁹ It is to be noted that the damages recoverable in such an action are substantially the same as are recoverable in an action on the case, or, in the case of a sale by the pledgee, in an action in assumpsit for money had and received. Accordingly, it can be said that the result of such a holding is not improper. It is believed, however, that there is no proper theoretical basis for holding that the pledgor's right to sue in conversion is as of the date of the pledgee's transfer of the pledge regardless of the question of whether the debt has matured at that time and whether the pledgor has tendered the same to the pledgee. It is urged (unless the pledgor has rescinded the agreement), that without the maturity of the debt and a tender of the same, the pledgor has no right to sue in conversion but that his remedy should be as above explained, namely, case or possibly assumpsit for money had and received, if the act of transfer by the pledgee was a sale of the pledge. It is also submitted that if a pledgee may rescind he cannot claim possession of the goods without first making a tender of the debt.

An action for conversion is predicated on the fact that a plaintiff is entitled to the immediate possession of the chattel and has been deprived thereof. If the theory of the action is trover, the plaintiff recovers money but the money is allowed in lieu of the chattel, and the plaintiff has a right to the money, only, because he had a still more fundamental right to the chattel. In other words, money is substituted for the specific chattel and its recovery is not allowed unless the plaintiff has a right to the possession of the chattel at the time he brings his action.³⁰ In

article of fluctuating value. See *infra* note 32 and text in connection therewith.

29. No case has been found where the action has been entertained before the maturity of the debt although as indicated such an action, under the theory adopted, would be properly brought.

30. *Gordon v. Harper* (1796) 7 Term. Rep. 9; *Union etc. Co. v. Mal-*

every pledge transaction the agreement between the parties is that the property is not to be returned to the pledgor until the debt has been paid, and so by the very terms of the agreement the pledgor is precluded from asserting a right to the possession of the goods until the debt secured has been satisfied, or at least until he has offered to pay the same and his tender has been rejected.^{30a} It is because of this contractual obligation, resting on the pledgor that it is urged that theoretically the action of conversion ought not to lie if only the pledgee has misappropriated the goods. To make the pledgee's conduct objectionable in this form of action, in addition to the illegal disposition of the goods by the pledgee, the debt should have matured and the amount thereof either paid or tendered. The pledgee's wrong ought not to make the pledgor's rights greater, nor put him in a better or different position with respect to the possession of the pledge than if there had been no misappropriation by the pledgee. Accordingly the sounder cases are to the effect that the pledgor, if he is affirming his rights as a pledgor, in spite of the illegal transfer by the pledgee, cannot sue in conversion until he has tendered the amount of the debt, which is not permissible until after the maturity of the same.³¹

It will be argued against the last suggestion that the

lory etc. Co. (1895) 157 Ill. 554, 41 N. E. 888; *Stearns v. Vincent* (1883) 50 Mich. 209, 15 N. W. 86; *Brown v. Pratt* (1855) 4 Wis. 513. See also *Sutherland Damages*, 4th. ed. sec. 1108, "****to entitle the plaintiff to recover two things are necessary: first, property in the plaintiff; and secondly, a wrongful conversion by the defendant." See also *Martin*, *Civil Procedure*, sec. 97.

30a. A tender of the debt when due ought to be the equivalent of performance so far as bringing the action of trover is concerned. Upon tender the pledgor has put the pledgee in default. See *Southworth Co. v. Lamb* (1884) 82 Mo. 242; *Lawrence v. Maxwell* (1873) 53 N. Y. 19. See also *Tennent v. Ins. Co.* (1908) 133 Mo. App. 345, 112 S. W. 754; *McCalla v. Clark* (1875) 55 Ga. 53.

31. "But it is a contradiction in fact, and would be to call a thing that which it is not, to say that the pledgee consents by his act to revest in the pledgor the immediate interest or right in the pledge which by the

bailment is ended as soon as the pledgee converts the pledge and that an immediate right of possession accrues in favor of the pledgor.^{31a} It is not believed, however, that the argument is sound. There is more than a bailment involved; the pledgor has agreed that the possession of the property shall be out of him until the debt is paid and this contract is binding on him even though the pledgee has breached his side of the same. Perhaps the pledgee's violation of the agreement might warrant the pledg-

bargain is out of the pledgor and in the pledgee. Therefore for any such wrong an action of trover or detinue, each of which assumes an immediate right of possession in the plaintiff, is not maintainable, for that right is clearly not in the plaintiff." *Halliday v. Holgate* (1868) L. R. 3 Ex. 299, p. 302. See also *accord Donald v. Suckling* (1866) L. R. 1 Q. B. 585, which was followed in *Halliday v. Holgate, supra*.

In *McClintock v. Bank* (1893) 120 Mo. 127, 24 S. W. 1052 it was held that a wrongful transfer of the pledge would not wipe out the debt secured and "until that debt be in some way got out of the way, plaintiff (who was the pledgor's assignee) has no legal right to the stock (the pledge) or its proceeds." The action was for conversion. See *accord Schaaf v. Fries* (1901) 90 Mo. App. 111; *Hopper v. Smith* (1882) 63 How. Pr. (N. Y.) 34.

In *Richardson v. Ashby* (1895) 132 Mo. 238, 33 S. W. 806 the pledgee sued the pledgor for the debt secured, having prior to his action converted the pledged property. The pledgor counterclaimed for the conversion, but had never made a tender of the debt. The court held that the tender of the debt was not a condition precedent to the counterclaim. This decision is not believed to be essentially inconsistent with those in *McClintock v. Bank* and *Schaaf v. Fries, supra*. The cases can be distinguished. It is proper to hold a tender essential in a case where the pledgor is suing the pledgee, but where the pledgee is himself the moving party and is suing for the debt, the matter of a tender by the pledgor becomes unimportant.

In *Hagan v. Bank* (1904) 182 Mo. 319, 81 S. W. 171 plaintiff sued for an accounting and for redemption, if possible. It was held that in an action in equity the tender would not be required, especially where the pledgee had admitted the conversion and the sale of the pledge. But the rule in equity as to a tender may well be, and frequently is, different from the rule at law. But see *Bell v. Bank* (1908) 143 Cal. 234, 94 Pac. 889. See as to what constitutes a tender *Hurt v. Cook* (1899) 151 Mo. 416, 52 S. W. 396.

31a. See *supra* note 27 and text in connection therewith.

or's rescission of the contract^{31b} and give him a right after rescission, to claim a return of the property. In every case of rescission, however, there must be *restitution*, and restitution entails a return by the rescinding party of all benefit received under the contract. If therefore the pledgor is claiming that he has rescinded he will fail because he has not returned the money which he had received from the pledgee. It seems certain that the pledgor can only claim a right to the property pledged if he is either affirming the contract or disaffirming it, and in each case his right to the property can only be based on the fact that he has offered the money to the pledgee.

It might be said that requiring a tender by the pledgor is futile. Why compel a man to make a tender and demand the return of the goods when his demand will only be refused, as will of necessity be the case? It would seem that a sufficient answer to such a question would be that without the tender no right exists. But in addition to this reason, it is believed that fixing the date of tender as the time when the pledgor will have a right to the possession of the goods will, in some cases, make the matter of assessing damages easier and more accurate. Suppose that the appropriation of the property occurs before the maturity of the debt, and at that time the same is worth \$60, but at the time of the maturity of the debt it is worth \$100. If justice is to be done to the pledgor he ought to be able to compel the pledgee to account for the greater sum, and this will be easy if it is said that the right of the pledgor arises when he makes a tender and not before. Or again, suppose that the goods at the time of the conversion were worth \$100 but at the time of the maturity of the debt were worth \$60. In trover it would be proper to allow to the pledgor the value of the goods at the time that he, by his agreement, would have been entitled to them, and no more, yet if it is held that the pledgor's right is as of the date the pledgee appropriated the property, the pledgor will receive \$40 more than he would have gotten had there been no breach of the agreement

31b. See *infra* note 32a and text in connection therewith.

at all. The fact is that if we hold that the pledgor's right to the possession of the goods and to sue in trover arises at the very moment of the pledgee's transfer of the pledge, we are not dealing with the situation as it is. We are not treating the matter accurately and with precision and, in the matter of measuring damages, the rule will not afford at all times a proper amount of compensation. Sometimes the pledgor will not receive enough and sometimes he will receive too much. On the other hand, if we treat the rights of the parties as they actually are under the agreement, and hold that the pledgor's right to possession (and hence his right to sue in conversion) does not arise until he has made a tender we shall be able to give him in the way of damages exactly the sum of money that he expected to get out of the contract, and that it was agreed he should get.

The amount of money which a pledgor will recover, if he sues in case, and that which he will recover if he sues in conversion, upon the theory that his right arises as of the date of the pledgee's transfer of the property, will be the same. In a loose sense, therefore, it cannot be said that this latter group of decisions goes very far wrong; but the fact is that a pledgor ought to have an election between case on the one hand and trover on the other. The pledgor ought to be able to claim the value of his general property interest either at the time of the illegal disposition of the property by the pledgee, or at the time of the maturity of the same and tender, less, of course, the amount of the debt. It is the function of case to enable the pledgor to recover the first mentioned sum, and should be the function of trover to enable him to recover the last mentioned. But trover can only do this if it is held that the right to the possession of the pledge is as of the date of tender. If it is held that the right to the possession of the goods is as of the date of the transfer of the pledge, the result of the action is to allow the pledgor as damages only the value of his general property interest at the time of its destruction. There can be no objection to this so long as the value of the pledge does not change. If however the property rises in value the pledgor will lose the amount of the

increase unless indeed some unusual measure of damages is adopted to offset the error into which the decisions have fallen. This result in some cases has been prevented by permitting the pledgor to recover as the value of the property its highest value between the time of its transfer by the pledgee and the trial of the action.³² This measure of damages has been especially adopted in cases where the pledge has been one of stocks and bonds, the value of which fluctuates from day to day in the market. Obviously where this rule prevails and whenever it is applied no harm is done the pledgor and he is not deprived of his election, but the rule does not set the theory of the cases aright, nor return trover to the performance of its proper role in the law of conversion.

According to some decisions, if a party to a contract breaks the same and his breach is one that goes to the essence, his promisee, in addition to being able to sue on the contract and recover damages, may rescind, and upon making restitution, or offering to make it, may claim a right to the return of that which he has already given to his defaulting promisor by way of performance of his side of the agreement.^{32a} Perhaps there is room for the application of this doctrine to a case where the pledgee has illegally appropriated or disposed of the pledge. There can be no question but that this act on the part of the pledgee is a breach of the contract and goes to the essence of the agreement. Why not

32. *Douglass v. Kraft* (1858) 9 Cal. 562; *Markham v. Jawdon* (1869) 41 N. Y. 235. Other courts allow a plaintiff the highest intermediate value of the converted property between the time of its conversion and a reasonable time after notice of this act has been received by the plaintiff. *Dimock v. Bank* (1893) 55 N. J. L. 296, 25 Atl. 926; *Galigher v. Jones* (1888) 129 U. S. 193, 9 Sup. Ct. Rep. 335. As stated in the text, "the highest intermediate value" rule for measuring damages has been confined for the most part to cases of conversion of commercial securities such as stocks and bonds. Some cases have refused to even apply the rule in that class of cases; see *Jamison & Co.'s Estate* (1894) 163 Pa. 143, 29 Atl. 1001; *Dalrymple v. Baltimore etc. Co.* (1866) 25 Md. 269. See *Walker v. Baland* (1855) 21 Mo. 289.

32a. Williston, Contracts, sec. 1455 *et seq.*

then permit the pledgor to return the amount of the debt with interest thereon and demand a return of the pledge and, in case of the pledgee's refusal, permit an action of trover to lie? If such an action were permitted it would follow that a pledgor could sue at any time after the transfer of the pledge by the pledgee upon making a tender of the debt with proper amount of interest. The writer knows no case which has proceeded on this theory but it would seem unobjectionable.^{32b}

By the better considered authorities, in all cases of conversion, a plaintiff may waive his tort, as it is said, and sue in assumpsit for unjust enrichment. The action will be for goods sold and delivered or, if the conversion has been a sale, for money had and received.^{32c} A pledgor, therefore, in the event of the pledgee's having appropriated the property to his own use may sue in assumpsit instead of conversion. In a case of this kind there are two remedies afforded for the same wrong, either of

32b. The right to rescind is not universally acknowledged. Thus a seller is held not to have the right to rescind his contract if the buyer merely fails to perform. Williston, Sales, sec. 511. There is, however, authority recognizing the right of rescission in the case of a contract for the conveyance of land. In *Ankeney v. Clark* (1892) 148 U. S. 345, 13 Sup. Ct. Rep. 617 plaintiff was allowed to recover the value of wheat delivered to defendant in return for the latter's agreement to convey real estate, which had been broken by defendant. But there is authority *contra*. Williston, Contracts, sec. 1460, and cases cited.

It has been held that a plaintiff may replevy a chattel from a defendant who has gotten title to the same from plaintiff through false representations. The action is used for the purpose of bringing about a rescission. *Porter v. Leyhe* (1896) 67 Mo. App. 540. See Williston, Sales, sec. 567. Trover would lie as well as replevin, *id*.

Conceding, then, a right in the pledgor to rescind upon a tender of restitution, he ought to be able to bring about this result through an action sounding in conversion. It is a legal short cut to rescission.

32c. If the action is for money had and received, the action in effect amounts to a ratification of the pledgee's wrongful sale of the goods. *Belden v. Perkins* (1875) 78 Ill. 449; *Dimock v. U. S. Bank* (1893) 55 N. J. L. 296, 25 Atl. 926; (*dictum*) *Stearns v. Marsh* (1874) 4 Denio (N. Y.) 227 (*dictum*) 47 Am. Dec. 248; *Bryson v. Rayner* (1866) 25 Md. 424 (*dictum*) 90 Am. Dec. 69.

which may be availed of, *i. e.* the pledgor has an election. The action of assumpsit for goods sold and delivered is based on the conversion of the property and the facts which must be shown by the pledgor to entitle him to sue in conversion must also be shown to entitle him to sue in assumpsit. The measure of damages will be the same in both actions. If, therefore, a pledgor sues for goods sold and delivered, his right to do so ought to depend on the theory prevailing in the particular jurisdiction as to when the right to sue in conversion arises. If it is held that there is a right to sue in conversion without tender, then there ought to be a right to sue for goods sold and delivered without tender; but if a tender is essential to the action in conversion, it should also be essential in assumpsit.³³

When the pledgee's appropriation of the property involves its illegal transfer to a third party, the pledgor may, under proper restrictions, pursue his remedy against the transferee rather than against the pledgee. If the transferee takes the pledge innocently not knowing of the pledgor's outstanding interest, and the pledgor seeks to hold him liable, he should be regarded as the assignee of the pledgee and as such be given appropriate rights. The very fact that the pledgee purported to transfer greater rights than he had, ought to, and will assure to his transferee all the rights that he did have and was able to legally pass along. While it is true that the pledgee cannot as a rule separate the lien from the debt, and if he does the lien is gone and the intended transferee of the lien gets nothing, this rule ought to prevail only in cases where the taker of the property is cognizant of the real situation and does not intend to acquire the interest of the pledgee. It is entirely correct to hold that a purchaser of a lien as such without the debt gets nothing by his purchase. On the other hand, however, if A buys property from B, a pledgee, believing that B owns the same, intending to get full ownership himself and not to get a lien without a debt, there would seem to be no real objection to holding that his purchase operated to give him

33. See Woodward, *Law Quasi Contract*, secs. 270-272, 277.

all the rights that A had, and hence as an assignment of the debt and the property as incidental thereto.^{33a} In any event, this is the theory that the courts have adopted when the pledgor proceeds against an innocent transferee of the pledged property and it seems to work out as justly as possible the rights of the parties. Hence, if the debt is still unpaid, the pledgor will not be permitted to hold the transferee for a conversion without a tender of the amount of the debt being made first.³⁴ Naturally if the debt has already been paid, there is no further obligation resting on the pledgor so far as a tender is concerned; but the transferee ought not to be liable for conversion, if he still has the pledge in his possession and has exercised no acts of ownership over the same, until the pledgor has given him notice of his rights.³⁵

Whenever the transferee knows of the pledge at the time of acquiring the chattel from the pledgee and does not take the property innocently, it is held that he becomes by the very act of taking a converter and the pledgor may sue him without tender of the debt or a demand for the return of the pledge.³⁶ Certainly

33a. *Talty v. Trust Co.* (1876) 93 U. S. 321, 23 L. Ed. 886; *Donald v. Suckling* (1866) L. R. 1 Q. B. 586; *Williams v. Ashe* (1896) 111 Cal. 180, 43 Pac. 595; *Bradley v. Parks* (1876) 83 Ill. 169; *Bank v. Renshaw* (1894) 78 Md. 475, 28 Atl. 281. In *Young v. Guy* (1882) 87 N. Y. 457 a vendor of land mortgaged the same to A. to secure an antecedent debt. It was held that A was not a *bona fide* purchaser but that he did succeed to the rights of the vendor, and had a lien on the land to the extent of the agreed purchase price. The case involves the same principle as applied in the pledge cases, namely, that when a grantee cannot take the title, which the grantor purports to pass, still he will take whatever interest the grantor did have in the property even though such interest is merely a debt and security.

34. See *supra* note 33a.

35. This is the general rule in the case of an innocent conversion. *Pease v. Smith* (1875) 61 N. Y. 477. But if the pledgee's transferee has exercised dominion over the goods and treated them as his own through use, no demand should be essential. *Robinson v. Hartridge* (1869) 13 Fla. 501. And see *Hyde v. Noble* (1843) 13 N. H. 494, 38 Am. Dec. 508 holding mere purchase to constitute a conversion.

36. This proposition is usually assumed, but see *supra* note 33a, especially *Bank v. Renshaw*, there cited.

if the debt has been paid such a decision is correct. The position of the transferee under such conditions is that of a deliberate converter. If the debt was not paid at the time of the transfer, the soundness of the rule is not so certain. It is arguable under these facts that the transfer still operated to assign the pledgee's interest, which would involve, in some jurisdictions at least, the further proposition that the pledgor could not hold the transferee for a conversion without a tender of the debt.³⁷ Perhaps the suggestion is sound. It is conceivable that the act, which results in an assignment where the taking was innocent, should have the same result where the taking was in bad faith. Of course, the proposition that the innocent taker is an assignee is adopted to protect an innocent taker and the right of the transferee is in the nature of an "equity." Perhaps a court ought not to fabricate an "equity" in favor of a guilty converter. But it is certain that if it is only a matter of finding an intent the same intent can be found in the one case as in the other, and so, perhaps, the transferee ought to be regarded as standing in the shoes of the pledgee.

Apparently, the courts only regard the pledgee's innocent transferee as the assignee of the pledge and of the debt in cases where the pledgor is suing the latter for the appropriation of the pledged property. This becomes obvious in the cases where the pledgor is suing the pledgee for a conversion resulting from the transfer of the pledge. In most of those cases, as already noted, the pledgee is permitted to set off or recoup the amount of the debt secured, thereby reducing the amount of the pledgor's recovery to this extent.³⁸ Permitting this recoupment must be because the courts regard the pledgee as still being the owner of the debt. Of course, after the judgment is satisfied the pledgor no longer has a claim on the converted chattel, and the title, which the pledgee originally purported to transfer to the purchaser or taker from him, is a reality so far as the pledgor is concerned.³⁹

37. See *supra* note 31.

38. See *supra* note 24a.

39. The judgment's satisfaction operates to pass the pledgor's title to

There is, therefore, no injustice done to the pledgee's transferee. He has gotten as complete a title as he could have expected from the pledgee and his dealings with the latter are left undisturbed. For this reason it is not necessary in this case, in order to protect the innocent transferee, to hold that he is the assignee of the debt. If, however, the pledgor sues the transferee, the courts, in order to protect an innocent party, are forced to regard the latter as entitled to the debt and to permit its being set off against the value of the property. If this were not done the transferee would lose all to no one's legitimate advantage which, as he has intentionally done no wrong, would be an undesirable result to reach.

Occasionally the pledgee has illegally transferred the pledge to another and after so doing has sued the pledgor to recover the debt. The action should not lie.^{39a} Relief should be denied, not because the debt has been necessarily paid; it may or may not have been, depending on the value of the property at the time of its illegal appropriation by the pledgee. The reason for refusing to give the desired relief should be because the pledgee, having parted with the pledge, is unable to return it to the pledgor, which, by the agreement between the parties, is a condition to the pledgor's obligation to pay. It is not proper to allow a pledgee to insist upon the pledgor's performance of the agreement while he himself is substantially in default with respect to the performance of a condition to the pledgor's duty to pay. There is also a further objection to the pledgee's recovery, namely, that if the pledgee has passed the property to another, such transferee might be regarded as the owner of the debt, and has been so regarded where he took the property without notice of

the pledgee or his successor in interest. *White v. Martin* (1834) 1 Port. (Ala.) 215, 26 Am. Dec. 365; *Miller v. Hyde* (1894) 161 Mass. 472, 37 N. E. 760; *Stirling v. Garritee* (1862) 18 Md. 468; *Johnson v. Dun* (1899) 75 Minn. 533, 78 N. W. 98.

39a. *Sproul v. Sloan* (1913) 241 Pa. 284, 88 Atl. 501. See *Richardson v. Ashby* (1895) 132 Mo. 238, p. 247, 33 S. W. 806.

the pledge.⁴⁰ In spite of the apparent soundness of the above contention, some cases have allowed the pledgee to sue for the debt after an illegal disposition of the pledge to a third party but have reduced the amount of recovery by the value of the property at the time of its transfer by the pledgee, or within a reasonable time after notice of its transfer has been brought home to the pledgor.⁴¹ The *ratio decidendi* of these cases must be that the debt is something distinct and apart from the security, and so long as the debt has not been paid it ought to be recoverable, regardless of what may have happened to the security. It must be said that so long as the pledgor is privileged to set off or recoup the value of the property no harm or injustice is done. It is true that in the end each party receives his due in dollars and cents, but it is believed that the moral effect of such a decision is unwholesome. It makes it possible for a person in the position of a fiduciary to violate the confidence and trust placed in him, and to then proceed as if no wrong had been done by him.

The rule just mentioned, permitting the pledgee, in spite of his conversion, to sue upon the debt has led to the following situation; the pledgee being a converter may sue the pledgor for the debt and the pledgor being a defaulting debtor may also sue

40. See *supra* note 34, and *Whitney v. Peay* (1862) 24 Ark. 22, *accord*.

41. In *Richardson v. Ashby* (1895) 132 Mo. 238, 33 S. W. 806, a pledgee recovered on the debt under the conditions mentioned, but the pledgor did not resist the action. *Minor v. Beveridge* (1894) 141 N. Y. 399, 36 N. E. 404; *Dimock v. Bank* (1893) 55 N. J. L. 296, 25 Atl. 926; *Rush v. Bank* (1895) 71 Fed. 102.

Professor Edward H. Warren approves such a decision, urging that there is "no occasion for the court to lay down a rule that an unauthorized transfer of the pledge forfeits the right *in personam* to which the pledge was security." Warren's Cases on Property, p. 374. It is submitted that the matter is not one of forfeiture but is merely a matter of contract law. The pledge cannot be treated as a transaction separate and apart from the loan; it is a part of the same contract. The agreement is that when the money is paid the security will be returned. If the pledgee cannot perform this agreement, his right *in personam* is not enforceable.

the pledgee for the conversion.⁴² In the first case the pledgor, in most jurisdictions, sets off or recoups the value of the property,⁴³ and in the second case the pledgee reduces the amount of recovery by the amount of the debt.⁴⁴ Although no authority has been found, it is certain that an action brought by either party, and pursued to judgment must prevent a suit by the other party if the appropriate matter for recoupment has been duly pleaded and allowed. In the pledgee's action the recoupment is a substitute for the pledgor's action of trover, and in the pledgor's action it is a substitute for the pledgee's action of debt. The result therefore obviously is that whichever action is brought, the rights of both parties may be finally settled and adjudicated. Moreover, if the pledgee's disposition of the property has been a transfer of the same to another, title in such transferee may be confirmed because the pledgor in either action is allowed the value of the property.⁴⁵

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42. See *supra* notes 28 and 31.

43. See *supra* note 24a.

44. See *supra* note 41.

45. Of course, in the normal action of trover the title will not be confirmed in the defendant until the judgment is satisfied. But if the pledgee is suing the pledgor on the debt, and the debt exceeds the value of the property, and recoupment is allowed, title will be immediately confirmed because the pledgor is allowed by the recoupment the value of the property, it being deducted from the pledgee's claim.

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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—Mr. Justice Holmes, *Collected Legal Essays*, p. 269.

The University of Missouri School of Law regrets to announce the death of Judge John D. Lawson. Judge Lawson died Friday, October twenty-eighth, in Chicago and was buried in Columbia, Mo. Judge Lawson came to the University of Missouri in 1891 as professor of Contracts and International Law. In 1903 he was made Dean of the School of Law and continued in this capacity until 1912. At that time he was compelled to resign on account of his failing health. He was greatly beloved by all the students who came to this school while he was connected with it. He had great capacity for inspiring the students and has made marked contributions to legal literature. It is not too much to say that his name is familiar to every lawyer in the United States.

NOTES ON RECENT MISSOURI CASES

MORTGAGES—VALIDITY OF DEED OF TRUST GIVEN TO SECURE THE DEBT OF A THIRD PARTY. *Finnerty v. Blake Realty Co.*¹ Plaintiff brought an action to restrain foreclosure, under a power of sale, of a deed of trust, which was given by plaintiff and her husband, Thomas Finnerty, to secure payment of their recited joint note

1. (1918) 276 Mo. 332, 207 S. W. 772.

for \$6,000 dated April 1st, 1908, and payable to one Willemsen three years from date. As a matter of fact no such note was ever executed by plaintiff. She never intended to execute such a note, or that the deed of trust should secure any obligation whatever to Willemsen, or to anyone else. So far as plaintiff was concerned, apparently she only gave the deed of trust to help her husband in his business if such aid could be given without the deed's serving as security for any real debt. Thomas Finnerty, however, at the time that the deed was executed, did, without plaintiff's knowledge or consent, give his own individual promissory note to Willemsen for \$6,000 together with the deed of trust, intending that it should secure any obligation that might arise from the note, and Willemsen, without giving value to Thomas Finnerty, endorsed the note in blank, without recourse, and delivered it with the deed of trust back again to Thomas Finnerty.

Thomas Finnerty then recorded the deed of trust and kept it and the note, which it was intended to secure, in his possession until its maturity at which time the note was extended by Willemsen for a period of five years and left with the deed of trust in Finnerty's keeping. Thereafter, Thomas Finnerty purchased some property from one Crebs, giving Crebs purchase money notes in payment of the same, and depositing with Crebs as collateral security for the payment of these notes, the Willemsen note and deed of trust. Still later Crebs sold the purchase money notes, and assigned along with them the Willemsen note and deed of trust to Blake Realty Co. After the Blake Co. had purchased these notes, Thomas Finnerty defaulted in the payment of the same, and the Blake Co. duly foreclosed the pledge, purchasing itself the Willemsen note and deed of trust. The Blake Co., having thus become the owner of the deed of trust and the note secured thereby, caused a foreclosure sale to be commenced at the proper time, and at this point plaintiff brought this action, claiming that the deed was not valid as to her interest in the property because she had not made the conveyance to secure *any debt whatsoever*. The Circuit Court issued an injunction restraining foreclosure of the deed as to plaintiff's interest and upon appeal the Supreme Court affirmed the decree.

The Supreme Court held that the deed of trust so far as plaintiff was affected thereby was a nullity. In this connection the court said: "A conveyance of real property by a mortgage or deed of trust in the nature of a mortgage can only be effective as such when given to secure a pre-existing, then created or after-arising obligation, or the performance of some duty entailing a pecuniary liability. Absent therefore, the existence of a debt, and the necessary consequent relation of debtor and creditor between the grantor and the grantee there can be no mort-

gage or deed of trust. (*Sheppard v. Wagner* 240 Mo. 1. c. 433.)"² The court then found that plaintiff had incurred no indebtedness in any of the above enumerated transactions, and accordingly held that the deed as to plaintiff was not a valid security. The court also suggested that even conceding that Thomas Finnerty might be indebted under the Will-emsens note, and the deed effective to cover his interest in the land conveyed, still this fact would not affect plaintiff's rights because the deed, to pass her interest as security would have to secure *her* debt. Said the court: "Therefore whatever binding force the conveyance had in securing the payment of the debt evidenced by the note, was limited to his (i. e. Thomas Finnerty's) interest in the real estate described and not to that of the respondent (i. e. plaintiff's). This because it was not her debt * * *."³

Whenever a mortgage is given and it secures no obligation whatever, it cannot be foreclosed and the plea that there was no debt secured will defeat an action of foreclosure. Indeed the mortgagor can show under such a plea by parol evidence that the debt recited as secured never did exist, and that no debt at all was intended to be secured or was secured. Equity has always regarded a mortgage as being merely incidental to the debt, and it is always provable that no debt existed.⁴ Now in the instant case apparently there never was any debt which was to be secured by plaintiff's deed and therefore the result of the decision was probably correct.^{4a} It is not, however, the purpose of this note to discuss this problem, but rather to inquire into the soundness of the general rule stated by the court to the effect that there never can be a valid mortgage or deed of trust unless the same is given to secure the debt or obligation of the the *mortgagor* or *grantor*. Must there, as the court argues in the principal case, be a debtor-creditor relation between the grantor and the grantee? Suppose that A desires to aid B in borrowing money from C, and in order to accomplish this result he gives to C a mortgage or deed of trust to secure money loaned by C to B at his, A's, request. Is it possible that upon foreclosure, in the event of B's default, that A can defeat the action by showing that he, A, is not the principal debtor and that he did not incur any debt himself? If such is the rule, it should be distinctly understood by the business community, as it would seem to go contrary to the normal con-

2. (1918) 276 Mo. 1. c. 338, 207 S. W. 772.

3. (1918) 276 Mo. 1. c. 338, 207 S. W. 772.

4. *Harwood v. Toms* (1895) 130 Mo. 225, 32 S. W. 666; *Lappin v. Crawford*

(1909) 221 Mo. 380, 120 S. W. 605; *Schaeppi v. Glade* (1902) 195 Ill. 62, 62 N. E. 874; *Fisher v. Meister* (1872) 24 Mich. 447. See also *Crews v. Lombard* (1916) (Mo. App.) 182 S. W. 825.

4a. See *infra* note 11.

ception as to the nature and functions of a mortgage. Moreover, it should be pointed out that such a rule will lead directly to the proposition that every time a married man procures his wife to join in a mortgage to secure merely *his* debt, or obligation, the wife's dower rights will not be affected by the mortgage, or pass as security, "this because it was not her debt" ⁵ that was secured.

"A mortgage is a security for the performance of an agreement, which is usually to pay a sum of money. Leaving out of view other agreements than those for the payment of money, it is essential that there be an agreement, either express or implied, on the part of the mortgagor, *or some one in whose behalf he executes the mortgage*, to pay to the mortgagee a sum of money. If there is no debt there is no mortgage."⁶ The requirement of a debt is fundamental, because, if there is nothing to secure, the mortgage can have no purpose for existing, but it is one thing to say that there must be a debt, and another to say that the debt must be that of the mortgagor. Why cannot a mortgagee buy security from the mortgagor to secure the debt of another, and why cannot the extension of credit to that other be the consideration furnished for the security given by the mortgage?⁷ It is believed that as a matter of principle and justice that this ought to be possible and there is authority so holding.

In *Herron v. Stevenson*⁸ a mortgagor gave a mortgage to secure a note upon which her three sons were liable as endorsers, but with which note she had no connection whatever. The court held that the mortgage was valid and this although the mortgagor secured no pecuniary advantage as a result of the transaction. The case of giving a mortgage to secure the debt of another has arisen most frequently where a wife has conveyed her property to secure the obligation of her husband. Such a mortgage is generally held to be valid and the cases in Missouri are in accord. In *Johnson v. Franklin Bank*⁹ it was held that a wife could validly give a deed of trust on her separate property to secure the pay-

5. 276 Mo. 1. c. 338. The quotation is from the opinion in the principal case.

6. *Henley v. Hotelling* (1871) 41 Cal. 22, p. 28.

7. As a matter of simple equity the mortgagee ought to succeed. A man who has advanced money on the faith of security may well lose "his all" if his security is denied him. For this very reason equity has always specifically enforced contracts to give a mortgage if the plaintiff's side of the agreement has been executed. *Hermann v. Hodges*

(1873) L. R. 16 Eq. 18; *Irvine v. Armstrong* (1883) 31 Minn. 216; *Dean v. Anderson* (1881) 34 N. J. Eq. 496. The mortgagee's "equity" is just as great in a case where the credit to be secured is extended to a third party as where it is extended to the mortgagor and the same principles should govern.

8. (1918) 259 Pa. St. 354, 102 Atl. 1049.

9. (1903) 173 Mo. 171; 73 S. W. 191.

ment of her husband's note, although she received no benefit from the transaction.¹⁰ It is urged that the rule embodied in the decisions, last cited, are in direct conflict with that stated in the case under review, but because there were other grounds on which the decision in the principal case might have been rested, it is not believed that the former cases are necessarily overruled. The matter, however, at this time is in doubt, and it is to be hoped that the Supreme Court may have an early opportunity to explain the exact holding in the *Finnerty* case, and settle the question as to the functions of a mortgage.¹¹

It is to be noted that the court in the instant case cited *Sheppard v. Wagner*¹² to support the proposition, that the validity of a mortgage or deed of trust depends on the relation of debtor and creditor between the parties to the instrument. In that case the question for determination was whether or not the transaction between the parties was a mortgage or a conditional sale. The court, quoting from *Bobb v. Wolff*¹³ said: "While the courts have applied many tests to disclose the true nature of the transaction, whether an absolute deed or a mortgage, the one sure test, and essential requisite has ever been 'the continued existence of a debt' from the grantor to the grantee in the deed. If there is no debt, the instrument cannot be a mortgage whatever else it may be, but if the investigation develops an existing indebtedness by the grantor to the grantee * * * the courts have with great unanimity construed the deed to be only a mortgage."¹⁴

In the connection in which the quoted statement was made it was sound and proper. If a real mortgage is disguised as a conditional sale,

10. See accord *Jones v. Edman* (1909) 223 Mo. 312, 122 S. W. 1047. In *Schneider v. Staher* (1855) 20 Mo. 269, a wife mortgaged her separate property to secure her husband's obligation. It was held that but for the wife's minority, she electing to avoid the mortgage, that it would have been valid and enforceable. See accord *Hagerman v. Sutton* (1887) 91 Mo. 519, 4 S. W. 73; *Rines v. Mansfield* (1888) 96 Mo. 394, 9 S. W. 798; *Borrett v. Davis* (1891) 104 Mo. 549, 16 S. W. 377; *Ferguson v. Soden* (1892) 111 Mo. 208, 19 S. W. 727; *Hach v. Hill* (1891) 106 Mo. 18, 16 S. W. 948; *McCullum v. Boughton* (1895) 132 Mo. 601, 30 S. W. 1028. See also *Wilcox v. Todd* (1877) 64 Mo. 388; *Thornton v. Bank* (1879) 71 Mo. 221; *Melcher v. Derkum* (1891) 44 Mo. App. 650; *Bell v. Bell* (1908) 133 Mo.

App. 570, 113 S. W. 667.

11. In *Graham v. Finnerty* (1921) 232 S. W. 129, the same transaction as in the principal case was again before the Supreme Court. The court stated (232 S. W. 1. c. 130) that its former decision, i. e., the one under review, held the deed of trust void as to plaintiff because it was given as security without her authority. The court did not refer at all to the proposition here under discussion to the effect that a deed of trust must secure the grantor's debt. A discussion of this point was unnecessary to its decision. There has therefore been no direct repudiation of this proposition.

12. (1911) 240 Mo. 409, 144 S. W. 394.

13. (1898) 148 Mo. 335, 49 S. W. 996.

14. 240 Mo. 1. c. 433.

the apparent seller or grantor has a right to prove this fact, have the instrument reformed and to redeem.¹⁵ Naturally, the way to prove that the transaction was in reality a mortgage was to show that there was a debt between the parties and that the conveyance was given to secure that debt, and if there was no debt proven to exist the grant could not have been considered a mortgage. Moreover, as the only debt which the plaintiff claimed to exist was one alleged to be due from the grantor to the grantee, it was natural and proper for the court to say that in that case there would have to be found to be a debt due from the former to the latter. In *Bobb v. Wolff*¹⁶ the question before the court was similar to that in the *Sheppard* case, namely, whether a deed absolute on its face was to be construed as a mortgage, and the court again held that it could not be so construed unless it was shown that there was a debt intended to be secured from the grantor to the grantee. This also was a correct decision, and as again the only debt, which it was asserted existed was one stated to be due from the grantor to the grantee the court said that the obligation had to run from that person. But suppose that in either of these cases the absolute grant had been made by the grantor, not to secure his own debt, but that of another person. It is believed that the decision under these conditions could and should have been the same, because there was a debt, and an intention to give the land as security.¹⁷

In other words, the emphasis in the above discussed cases is not to be laid especially on the fact that the *grantor* owed money and secured the same, but on the fact that there was *some debt* (which happened in both of the cases mentioned to be that of the grantor) to secure which the conveyance was made by the grantor. It is believed that the *Sheppard* and *Bobb* cases do not stand for the proposition that in all cases a mortgage or deed of trust to be valid must secure the debt of the mortgagor, or grantor, but merely hold that without a debt there cannot be a mortgage. Accordingly, it would seem that neither case sustains the rule for which it was cited in the *Finnerty* case.

P. M. M.

PRACTICE—DIRECTION OF VERDICT FOR THE PARTY HAVING (a) THE BURDEN OF PROOF AND (b) THE DUTY OF GOING FORWARD WITH THE EVIDENCE. *Downs v. Horton*.¹ Attention should be called to an error in a note on this subject in the

15. *Sheppard v. Wagner*, *supra*, note 12. *Bobb v. Wolff*, *infra*, note 16. See generally L. R. A. 1916 B. 18, note.

16. 148 Mo. 335, 49 S. W. 996.

17. See *Villa v. Rodriguez* (1870) 12 Wall. (U. S.) 323, accord with suggestion.

1. (1921) 230 S. W. 103.

last issue of the Law Series. It was there incorrectly stated that *Quisenberry v. Stewart*² is the last case in Missouri holding that the court will not direct a verdict for the party having the burden of proof where there is no contradictory evidence.

Just before the note was written, the decision in *St. Louis Trust Company v. Hill*³ was handed down in accord with the *Quisenberry* case. Since that time two decisions, *Lafferty v. Kansas City Casualty Company*⁴ and *Foster v. Metropolitan Life Insurance Company*,⁵ have been given which are in full accord with the rule announced in the *Quisenberry* case.

There have been other recent decisions, said to be in accord with the above general rule, which should be considered. They are especially interesting in the study of the question of directing the verdict for the proponent of an issue. These are bills and notes cases where plaintiff claims to be a *bona fide* purchaser for value before maturity and defendant pleads fraud in the inception and knowledge by plaintiff as the defense. It has recently been held by the Supreme Court that where the holder of the instrument shows by uncontradicted testimony that he is the holder in good faith for value before maturity, and the maker offers no evidence of knowledge upon the part of plaintiff, the alleged *bona fide* purchaser for value before maturity, of the fraud the plaintiff—the holder—is entitled to a directed verdict.⁶

The decision in these cases turned upon the meaning of Section 854 R. S. Mo. 1919, which states, “- - - but where it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title in due course, - - -”. It might seem from that statute that the burden of proving no knowledge of the fraud is upon the plaintiff. It was so held in the early decisions⁷ under the statute and the courts refused to direct a verdict for the holder. *Hill v. Dillion*,⁸ decided by the Springfield Court of Appeals, in 1913, was authority for holding that the burden was on the holder, and that the court could not direct a verdict for him. The court there stated that though it would have been proper to direct the verdict in such a case prior to the passing of this section in 1905, it would not now be proper

2. (1920) 219 S. W. 625, 22 Law Series p. 46.

3. (1920) 223 S. W. 434.

4. (1921) 229 S. W. 750.

5. (1921) 233 S. W. 499.

6. *Downs v. Horton* (1919) 209 S. W. 595.

7. *Link v. Jackson* (1911) 158 Mo. A. 63, 139 S. W. 588; *Johnson County Savings Bank v. Mills* (1910) 143 Mo. A. 265, 127 S. W. 425.

8. (1913) 176 Mo. App. 192, 161 S. W. 881.

to direct for the holder, he being made the proponent by the statute. But other decisions^{8a} were made which held that the term *burden* in the statute did not mean burden of proof, but burden of evidence, or as it is more commonly called, the burden of going forward, and that under the statute the defendant, the maker of the instrument, held the burden of proving that plaintiff knew of the fraud. Under this reasoning, it was held, the verdict could be directed for the holder of the note without violating the general rule, that a verdict cannot be directed in favor of the party having the burden of proof.

In the recent case of *Downs v. Horton*,⁹ the Springfield Court reversed its ruling in the *Hill v. Dillion*, *supra*, and held that the statute in question only placed the burden of going forward on the holder after proof of fraud in the inception and it was not only proper, but that it was the duty of the trial court to direct a verdict for the holder, if the plaintiff-holder showed by uncontradicted testimony that he was a holder in due course for value before maturity and the maker offered no evidence of knowledge of the fraud. This decision was affirmed by the Supreme Court in a very able and lucid opinion written by Ragland, C. The learned writer of the opinion called attention to other Missouri decisions, not bills and notes cases, which had held that a verdict should be directed by a trial court against the party having the duty of going forward with the evidence, who fails to go forward.¹⁰ The decision was later followed by the St. Louis Court of Appeals in *Ensign v. Crandall*,¹¹ and is now without doubt, the law in the state on this point.

It is submitted that this is a sound decision as a matter of principle and highly desirable. The refusal to direct in such cases frequently resulted in destroying the rule as to *bona fide* purchasers of commercial paper. In cases where the maker has been defrauded, and failed to receive value for his note, juries were strongly inclined against returning verdicts in favor of holders in due course. Verdicts for defendants frequently rendered by juries, in cases of this type, would without doubt in time seriously affect the prime object of the law of negotiable paper, viz, that negotiable paper shall have as nearly as possible the attributes of currency.

A review of the cases will demonstrate that whether a verdict could be directed for the holder in a bills and notes case before and after the section in question (which is a part of the N. I. L.) was passed in 1905

8a. *Reeves v. Letts* (1910) 143 Mo. App. 196, 128 S. W. 246; *Bank v. Railroad* (1913) 172 Mo. App. 662, 155 S. W. 1111.

9. (1919) 209 S. W. 595.

10. *Morgan v. Duffee* (1879) 69 Mo. 469, 33 Am. Rep. 508; *Rubottom v. Telegraph Co.* (1916) 194 Mo. App. 234, 186 S. W. 749.

11. (1921) 231 S. W. 675.

was in a state of confusion and uncertainty.^{11a} Why then, we are inclined to ask, should the courts be bound, hard and fast, by a rule forbidding the direction in favor of the proponent? It is submitted that these cases involve the same principles as the cases where a party has the burden of proof and there is no contrary evidence. The court is deciding that certain evidence is true, and is not permitting a jury to pass upon the credibility of witnesses who are not impeached and whose testimony is not improbable, when it decides that the burden of going forward has not been met and directs a verdict. The sole reason assigned why it has not the power to direct a verdict for the party with the burden of proof is that to do so is to deprive the jury of its power to decide whether the oral evidence of the witnesses is worthy of belief. In neither case, it is thought, is there an invasion of the province of the jury because in each instance there is no *issue of fact* for the jury to decide. The reasons for this position, viz, that there is no *issue of fact* to be decided and therefore nothing to go to the jury, will not again be set forth here as they have been fully set forth in the previous note mentioned at the outset of this note.¹²

P. M. P.

EVIDENCE—PRESUMPTIONS NOT EVIDENCE. *Stack v. General Baking Co.*¹ In the above case James Carroll testified that he had never been convicted of petit larceny. He was shown a record of conviction of James Carroll for petit larceny. The witness explained that the James Carroll mentioned in the record was his uncle. The court excluded the record. The appellant argued that there was a presumption of identity of persons from identity of names. The Supreme Court of Missouri did not question the presumption but held that it disappeared as soon as the witness testified as above set forth, and affirmed the judgment of the trial court.

The soundness of this decision, it is believed, cannot be questioned successfully. However, there appears to have been considerable confusion in other opinions of the Missouri courts in dealing with presumptions. In *Gitt v. Watson*,² a contest over the legal title to certain land, the rule was thus stated: "Both plaintiff and defendant claimed under Shaver. If there was a want of identity between the Shaver named by

11a. *Johnson v. Grayson* (1910) 230 Mo. 380, 130 S. W. 673; *Hamilton v. Marks* (1876) 63 Mo. 167; *Johnson v. McMurry* (1880) 72 Mo. 278; *Wright Inv. Co. v. Friscoe Realty Co.* (1903) 173 Mo. 72, 77 S. W. 296; *Bank v. Ham-*

mond (1907) 124 Mo. A. 177, 101 S. W. 677.

12. 22 Law Series, p. 46.

1. (1920) 223 S. W. 89.

2. (1853) 18 Mo. 274.

the defendant in deducing his title, with the Shaver who owned the certificate of location, the burden of proof was on the plaintiff. The names being identical, *prima facie* they are the same person, and it rests with the plaintiff to show that they are not the same."

The opinion in *Flournoy v. Warden*³ except for one statement that may be construed as stating that a presumption is a rule of evidence seems sound in maintaining that a presumption results from identity of names.

In *State v. Moore*⁴ it was stated that "identity of name is *prima facie* evidence of identity of person" and in reality it could have been decided that there was a presumption which prevailed since there was no evidence to the contrary. In *State v. McGuire*⁵ the presumption was properly handled. In *Geer v. Lumber and Mining Company*⁶ it was stated: "We think, therefore, the practicable rule should be that when the names of the grantor and grantee are the same and the land conveyed is identical, the proof of identity is *prima facie* sufficient." There seems to be no objection to such a statement.

Bland, J., in *Produce Exchange Bank v. North Kansas City Development Company*, by way of dictum, suggests that there is a "presumption of law that identity of name is evidence of identity of person."⁷ This declaration may be questioned. The matter may be stated in this fashion. John Jones may be shown to be grantee in deed "A" and grantor in deed "B". Such a showing may be said to constitute evidence of identity of person.^{7a} Whether any presumption will arise upon such a showing is an entirely different matter.⁸ If it does arise, the presumption is not itself evidence.⁹

How is a jury to weigh a rule of law, a presumption, with items of evidence? The significant effect of a presumption is to throw on the party against whom it operates the burden of *going forward* with the evidence.¹⁰ In fact, presumptions are a part of the substantive law and

3. (1853) 17 Mo. 435.

4. (1875) 61 Mo. 1. c. 279.

5. (1885) 87 Mo. 642. In *Long v. McDow* (1885) 87 Mo. 197 there is dictum that identity of name is *prima facie* evidence of identity of person. See *Jones v. Lumber Co.* (1920) 223 S. W. 63, 1. c. 69.

6. (1895) 134 Mo. 85, 34 S. W. 1099. *Keyes v. Munroe* (1915) 266 Mo. 114, 180 S. W. 863 affords no basis for the position that the presumption of identity of person from identity of names is an item of evidence. See *Hunt v. Searcy*

(1901) 167 Mo. 158, 67 S. W. 206.

7. (1919) 212 S. W. (Mo. App.) 899.

7a. See instruction three for plaintiff in *LaRiviere v. LaRiviere* (1883) 77 Mo. 512, 514. Compare *Stach v. General Baking Co.*, note 1, *supra*.

8. 4 Wigmore on Evidence, sec. 2529. *Huston et al v. Graves* (1919) 213 S. W. 77.

9. Hinton's Cases on Evidence, pp. 79-80.

10. Thayer's Preliminary Treatise on Evidence, pp. 563, 575; 4 Wigmore on Evidence, sec. 2491.

do not properly belong to the law of evidence.¹¹ In considering the particular presumption in the above cases, it is a matter of common reasoning among men that if one meets one James Carroll he is probably the same James Carroll of whom he has heard. Such facts so often repeat themselves that the process of reasoning is cut short and a rule of substantive law is laid down, to the effect that where there is an identity of name it will be presumed there is an identity of person. Any evidence to the contrary, however, will render the presumption unsafe to rely upon. The result is that it vanishes immediately upon the introduction of contrary evidence. The presumption itself is not and cannot be evidence and it has no probative force. If the party against whom the presumption operates fails to bring forward evidence the case will be settled by virtue of the presumption. It is not settled that way because the presumption is evidence, but since there is no evidence at all, the case is to be so decided according to a rule of substantive law resulting from the identity of names. Nevertheless, there are too many courts which assert that a presumption is evidence or has probative value.¹² It is not believed that this point of view is either theoretically sound or a satisfactory rule from practical considerations.

The opinions in Missouri with reference to the presumption arising from identity of names have been fairly uniform. There is no attempt here to consider many other presumptions. A few decisions, however, which throw light on the major subject are worthy of attention.

In *State v. Shelley*¹³ Sherwood, P. J., uttered a dictum that the presumption of innocence "in every case is to be regarded by the jury as *matter of evidence* to the benefit of which the party is entitled." This is *stated* to be erroneous in *State ex rel v. Ellison*¹⁴ where Blair, J., wrote a commendable opinion.¹⁵ It is not only *stated* that: "The presumption itself is not evidence," but it is held that it is erroneous in a civil case upon an insurance policy, the defense being arson, to give an instruction that there is a presumption of innocence of a person alleged to be guilty of a crime "just as in the trial of a person charged with crime."

11. Thayer's Preliminary Treatise on Evidence, p. 326-327.

12. See for example *Groves v. Colwell* (1878) 90 Ill. 612; *Clifford v. Taylor* (1910) 204 Mass. 358, 90 N. E. 862; *Barber's Appeal* (1893) 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90 (the reasoning as to the nature of a presumption seems clouded. Compare *Wheeler et al v. Rockett et al* (1917) 91 Conn. 388, 100 Atl. 13, a well reasoned opinion stating

that the presumption of sanity would have no probative force. See Thayer, Preliminary Treatise, p. 564, n. 1.); *Hawkins v. Grimes* (1852) 52 Ky. 257; 8 Col. L. R. 127 (Confused discussion. Compare 9 Col. L. R. 435; 15 Col. L. R. 457.)

13. (1901) 166 Mo. 616, 66 S. W. 430.

14. (1916) 268 Mo. 239, 187 S. W. 23.

This is the correct position though it is admitted by Blair, J., that the contrary practice has been followed very often in Missouri without disapproval.

In *State v. Kennedy*¹⁵ it was held not to be error to refuse an instruction upon the presumption of innocence. The court, however, did not base its holding upon the proposition that a jury has nothing to do with a presumption. Rather the court concluded that an instruction on reasonable doubt was the legal equivalent of an instruction on presumption of innocence and that the evidence of guilt in the case was too clear to warrant a reversal of the judgment even if the instruction should have been given. It was also suggested that it is better practice to give such an instruction. Sherwood, J., concurred in the opinion reluctantly and because the evidence satisfactorily demonstrated the defendant's guilt.¹⁷ This probably explains his remark in *State v. Shelley*, *supra*.

The contrary point of view was ruled by Lamm, J., in *Cornelius v. Cornelius*.¹⁸ It was there held that it was error to refuse to instruct the jury that "the law presumes" that counsel given by a father to his son is in good faith. It was stated that the argument upholding the trial court "pressed home would overturn the necessity of giving the rule of law in criminal cases of a presumption of innocence." Apparently the ruling in *State v. Kennedy*, *supra*, was not in the mind of the writer. In any event it would seem as if there is very little left of this particular part of *Cornelius v. Cornelius* after *State ex rel v. Ellison*, *supra*.

In *Reynolds v. Casualty Co.*¹⁹ Brown, C., for the majority, discussed the existence of a presumption in case of a death either accidental or suicidal. It is not clear that he thought that a presumption should be considered an item of evidence. The gist of his opinion on this point seems to be that in determining the nature of the death "the unreasonableness of the theory of suicide must receive due consideration in weighing it against the more reasonable and natural theory of accident." There seems to be no particular objection to that proposition which certainly is not a declaration that a rule of law known as a presumption has of itself evidentiary value.

Faris, J., dissented in a brilliant opinion, in which Bond and Wood-

15. It would have been better, however, if the opinion had not attempted to follow a lot of useless terminology concerning presumptions. See 4 Wigmore on Evid., secs. 2490-2493 inclusive.

16. (1899) 154 Mo. 268, 55 S. W. 293.

17. The Supreme Court of Missouri refused to follow the unfortunate opin-

ion of Mr. Justice White in *United States v. Coffin* (1895) 156 U. S. 432, 15 U. S. Sup. Rep. 394. See Thayer's Preliminary Treatise on Evidence, p. 551. Compare 9 Harv. L. R. 144.

18. (1910) 233 Mo. 1. c. 36, 135 S. W. 65.

19. (1917) 274 Mo. 83, 201 S. W. 1128.

son, JJ., concurred. In this opinion we believe that the true nature of a presumption is stated by Faris, J., as follows: "The moment explanatory evidence comes into the case the presumption dissolves into thin air and becomes as wholly non-existent as though it never had had existence."²⁰

It seems to follow therefore that a presumption is not itself evidence and it should follow that a jury or trier of fact should not be instructed in terms of presumptions,²¹ for example, that certain presumptions exist which should be considered and weighed with the evidence in deciding questions of fact.

P. M. M.

EQUITABLE RESTRICTIONS UPON THE USE OF LAND—EMINENT DOMAIN—RIGHT OF COVENANTEE TO COMPENSATION. *Peters v. Buckner, et al.*¹ Applications were made for writs of prohibition and mandamus. By the first writ it was sought to prevent the taking of property, through condemnation proceedings, for school purposes without allowing to plaintiffs the value of a restrictive covenant, which would be violated by the use to which the land taken was to be put. The object of the second writ was to compel the assessment of these damages in the condemnation proceedings. Meadow Park Land Company for purposes of sale had laid out into lots a new district in Kansas City. A plat of the addition had been recorded. On this certain building lines had been marked and other restrictions had been noted. These restrictions forbade the erection of buildings for other than residential purposes and fixed a minimum value of the houses thus to be built. Some of the lots within the addition had been conveyed by the

20. One may wholly agree with Faris, J., in his incisive analysis of presumptions and yet not agree with his conclusion as to the facts. It is also possible that one may disagree with both opinions as to the conclusions reached as to the nature of the death. The plaintiff had the burden of *convincing* that death was accidental; defendant had the burden of *convincing* that death was suicidal. One may not be convinced as to either proposition but find himself unable to come to any satisfactory conclusion. In that event the defendant should have had judgment. See for a similar situation *Winans et al. v. Attorney General*, House of Lords (1904)

App. Cas. 287, opinion by Earl of Halsbury, L. C.

21. *McKenna v. Lynch* (1921) 233 S. W. 175 held the following instructions erroneous: "You are further instructed that the burden of proving contributory negligence on the part of the deceased, Michael McKenna, is upon the defendant, the presumption is that the deceased was in the exercise of ordinary care for his own safety at the time of his death, and this presumption continues until overthrown by a preponderance of greater weight of the evidence." Compare instruction number four for plaintiff in *La Riviere v. La Riviere* (1883) 77 Mo. 512.

1. (1921) 232 S. W. 1024.

land company, and each deed contained provisions, in the form of covenants, restricting the use of the land as mentioned. The deeds gave to each owner a right to enforce the restrictions as against all owners in the addition and stated that the covenants were made for the benefit of the grantor "and its past or future grantees of other lands" in the addition. Proceedings were instituted by the local school district to take land in this addition for the purpose of erecting thereon a school house. It was conceded that the construction of the building would be a violation of the restriction, if done by a grantee under the land company. Plaintiffs were owners, under the land company, of a lot adjacent to the land which the school district was seeking to condemn, and the land so to be taken was admitted by all concerned to be subject to the burdens in favor of plaintiffs.

The question in the condemnation proceedings was whether plaintiffs were entitled to compensation for the destruction of the restriction. The circuit court held that they were not because the restriction was not property within the meaning of the constitution. The Supreme Court granted the two writs and required the circuit court to allow damages to plaintiffs. All of the judges who concurred in the decision of the court considered plaintiff's right, as a covenantee, a property right,² an easement. One judge, over the dissent of the others, suggested that in any event plaintiffs should be compensated for the collateral damage that would result to them from such a use of the land.³

In 1848 the decision of Lord Cottenham in *Tulk v. Moxhay*⁴ introduced a new kind of burden on the land of another. In that case plaintiff sold certain lands to one Elms, requiring of him an agreement in the deed that a certain part of the parcel conveyed should always be kept as a garden. The purpose of the covenant was to benefit other lands of plaintiff, and to enable plaintiff's tenants in the enjoyment of this other land to have the use and the benefit of the garden on this adjacent land granted to Elms. Elms conveyed the land to defendant, who had notice of the agreement. Defendant threatened to violate the restrictions but a court of equity enjoined the contemplated breach. Had plaintiff brought his action at law upon the covenant, judgment would have been for defendant since law courts deny that burdens of this nature run with the land.⁵ English law, as distinguished from equity, has recognized for the most part two types of incorporeal rights which attach to ownership of land and pass with it into the hands of whomsoever it may

2. (1921) 232 S. W. 1. c. 1027.

3. (1921) 232 S. W. pp. 1028, 1029.

4. (1848) 2 Phillips 774.

5. *Brewster v. Kidgill* (1763) 12 Mod.
166; *Austerberry v. Oldham* (1885) 29

Ch. 750; *West Virginia Trans. Co. v. Pipe Line Co.* (1883) 22 West Va. 600,
46 Am. Rep. 527; *Brewer v. Newbold*
(1868) 19 N. J. Eq. 344.

come:⁶ (1) covenants running with the land, which operate within a very narrow field,⁷ and (2) rights, which are easements—true property rights in the land of another—, burdens imposed on one estate for the benefits of another.⁸ But again the creation of easements are restricted to a very narrow field and only such easements can be created as have been immemorially recognized and sanctioned by law.⁹

The general rule in equity where one agrees with another that his property shall be subject to certain burdens for the benefit of property belonging to his promisee, is that the agreement is specifically enforceable.¹⁰ It should be clear in such a case that damages for a breach of the agreement will not afford an adequate remedy. This is so because the acts which the covenantor agreed to are to be done on the covenantor's land which is beyond the control of the covenantee. The latter cannot take money awarded as damages and purchase the burden. The burden is unique because it is associated with the *covenantor's* land.

If it is once conceded that the covenantee is entitled to specific relief from his covenantor, it will follow that the covenantee will be entitled to the same relief against anyone claiming under the covenantor with notice of the agreement. It is accordingly well established that the covenantee can enforce the burden as against all claiming under the covenantor, who are not *bona fide* purchasers for value.¹¹ But a *bona fide* purchase will cut off the right of enforcement, which would seem to indicate quite clearly that the covenantee's right is merely an *equity*, and not a right legal in its nature.¹² Because the subject matter of the agreement is land, it might be argued that these burdens should be kept within definite and defined limits, and some courts have refused to enforce them unless they "touch and concern the land,"¹³ thereby affording an apt illustration of the application of the maxim that "equity follows the law." But for the most part such has not been the rule and the covenant has

6. Holmes, *The Common Law*, chap. XI.

7. Tiffany, *Real Property*, 2d ed., secs. 344-346.

8. On this distinction, see Holmes, *The Common Law*, chap. XI.

9. *Hill v. Tupper* (1863) 7 H. & C. 121.

10. *Tulk v. Moxhay*, *supra*, note 4; *Franklyn v. Tuton* (1821) 5 Maddock 469; *Manners v. Johnson* (1875) 1 Ch. 673; *Hood v. Ry. Co.* () 8 Eq. 666; *Prospect Park etc. R. R. v. Coney Island etc. R. R.* (1894) 144 N. Y. 152, 39 N. E. 17. See also *Stevens v. Realty Co.*

(1902) 173 Mo. 511, 73 S. W. 505; *Sharp v. Cheatham* (1885) 88 Mo. 498; *Keating v. Korfhage* (1885) 88 Mo. 524; *St. Louis etc. Co. v. Kennett Estate* (1903) 101 Mo. App. 370, 74 S. W. 474.

11. *Coughlin v. Barker* (1891) 46 Mo. App. 54 (*dictum*); *Rodgers v. Hoesgood* (1900) L. R., 1900, 2 Ch. 388. See also *Sharp v. Cheatham*, *supra*, note 10.

12. *Carter v. Williams* (1870) 9 Eq. 678; *Wilson v. Hart* (1866) 1 Ch. App. 463; *London Co. v. Gomm* (1881) 20 Ch. 562, p. 583.

13. *Norcross v. James* (1885) 140 Mass. 188, 2 N. E. 946.

been enforced against all grantees under the covenantor with notice, unless of course the court in a particular case has inclined to the opinion that the particular burden imposed is contrary to some policy of one kind or another.¹⁴ These rights have usually been described as restrictions, because the covenants are usually of a negative character, but this is accidental, it would seem, and a covenant imposing affirmative action on the covenantor should be and has been recognized as enforceable.¹⁵

Who may enforce these rights? It is certain that if the parties to the original agreement intend that the burden shall be for the benefit of the covenantee alone, he alone will have the right to enforce it.¹⁶ But suppose that it is the intention of the parties that the benefit shall run with the land of the covenantee. If this really is the purpose of the parties the benefit ought to run and the cases so hold.¹⁷ Indeed, it has been held that a subsequent grantee of the favored land may enforce the covenant even though he did not know of the existence of the covenant at the time he acquired title.¹⁸ The theory, apparently, is that the equitable right is appurtenant to and a part of the legal title. This, of course, is not literally the case.

In cases where there is an express statement that the benefit of the covenant is to pass with the land, there is no difficulty in determining the rights of subsequent grantees of the covenantee. The only matter that will usually prevent the running of the benefit is a *bona fide* purchase of the servient estate, a release or a waiver by the covenantee or one of his

14. *Robinson v. Webb* (1880) 68 Ala. 393; *Frye v. Partridge* (1876) 82 Ill. 267; *Stines v. Dorman* (1874) 25 Ohio St. 580; *American Co. v. Paper Co.* (1897) 83 Fed. 619.

15. *Merlin v. Coch* (1868) 6 Eq. 252; *Sharp v. Cheatham* (1885) 88 Mo. 498; *Carson v. Percy* (1879) 57 Miss. 97. If performance of the contract involved continuous activity by the covenantor or his successors in title, a court could refuse specific performance on the ground that equity will not supervise performance of such an agreement. See *Beck v. Allison* (1874) 56 N. Y. 366. But apparently this difficulty has not as a rule deterred the courts from granting relief in this class of cases. See *Jones v. Parker* (1895) 163 Mass. 564, 40 N. E. 1044; *Lane v. Newdigate* (1804) 10 Vesey 192. In the case last cited the decree of the court was negative in form, i. e. the

court forbade the defendant to break his agreement, but this in truth, it is submitted, is the same as enforcing specifically the covenant.

16. *Keats v. Lyon* (1869) 2 Ch. 218; *Clark v. McGhee* (1896) 159 Ill. 518, 42 N. E. 965; *Haines v. Einwachter* (1903) 55 Atl. (N. J.) 38; *Clapp v. Wilder* (1900) 176 Mass. 332, 57 N. E. 692.

17. *Nottingham Brick etc. Co. v. Butler* (1901) 16 Q. B. 261; *Coughlin v. Barker*, *supra*, note 11; *Coudert v. Sayre* (1890) 46 N. J. Eq. 386, 19 Atl. 190; *Bower v. Smith* (1909) 76 N. J. Eq. 456, 74 Atl. 675; *Lattimore v. Livermore* (1878) 72 N. Y. 174. See also *Baker v. St. Louis* (1879) 7 Mo. App. 429, *aff'd*. 75 Mo. 671.

18. *Rodgers v. Hosegood*, *supra*, note 11; but see *contra DeGray v. Monmouth Beach etc. Co.* (1892) 50 N. J. Eq. 329, 24 Atl. 388 (*dictum*).

grantees.¹⁹ Often the intention is not expressed. The rule, however, is clear. It is a problem of ascertaining the intention and it will have to be discovered in the circumstances accompanying the covenant.²⁰ It seems safe to say, however, that the courts are prone to impute an intention to benefit the land of the covenantee, if only the nature of the burden imposed is such as will be calculated to enhance the value of the land as land.²¹

Sometimes covenants are expressly or by implication exchanged between the parties with the end in view of imposing burdens on the land of each of the covenantors in favor of the land of the other and it may be the intent of the covenantors that the benefit of the covenant shall run with the land. In this case there is no objection to the benefit running and, as in the case of a single covenant, if the intention is present, it will run.²² Mutual covenants are usually found in cases similar to the one under review, where a large tract of land is divided for sale into lots, all of which are subject to the same restrictions. Because the owner in such a case plans to sell the lots, it is usually held that the sole purpose of the imposition of the burden is to benefit all the lots in any buyer's hands.²³ It would seem under these facts that no other intent with respect to the burden could be found. Therefore, all grantees ought

19. Where the covenants are mutual, and burdens are imposed on both parties a substantial breach by one will prevent his enforcing the restriction as against the other. See *Compton v. Strauch, infra*, note 23. That a breach by one may amount to a waiver, see *Scharer v. Pantler* (1907) 127 Mo. App. 433, 105 S. W. 668. As a waiver, see *Pete v. Foerstel, infra*, note 23. If the restriction has lapsed before the trial of the action, obviously no specific relief will be given. *Sanders v. Dixon* (1905) 114 Mo. App. 229, 89 S. W. 577. It has been held that if the plaintiff's interest is too remote as to vesting in possession specific performance will be denied. *Johnston v. Hall* (1865) 2 Kay & Johnson 414 (plaintiff a reversioner, following a long term.) As a general rule the courts are not deterred from giving relief merely because no great damage is caused the plaintiff as a result of the restriction's violation. See cases cited *infra* note 23. But see *Forsee v. Jackson* (1915) 192 Mo. App. 408, 182 S. W. 783, where the court denied relief because the violation of the

restriction was trivial and the damage resulting negligible.

20. *Coughlin v. Barker, supra*, note 11; *Kenwood Land Co. v. Hancock etc. Co.* (1913) 169 Mo. App. 715, 155 S. W. 861; *Clapp v. Wilder* (1900) 176 Mass. 332, 57 N. E. 692; *Hemsley v. Marlborough etc. Co.* (1904) 68 N. J. Eq. 596, 61 Atl. 455; *Clark v. Martin* (1865) 49 Pa. 289; *Ball v. Millikin* (1910) 31 R. I. 36, 76 Atl. 789.

21. *Doerr v. Cobbs* (1909) 146 Mo. App. 342, 123 S. W. 547; *Clark v. Martin, Ball v. Millikin, supra*, note 20; *Post v. Weil* (1889) 115 N. Y. 361, 22 N. E. 145. See also *Coughlin v. Barker, supra*, note 11; *Whitaker v. Lafayette etc. Co.* (1917) 197 Mo. App. 377, 196 S. W. 109; *Zinn v. Sidler* (1916) 268 Mo. 680, 187 S. W. 1172.

22. See *Collins v. Castle* (1886) 36 Ch. D. 243; *Hutchinson v. Ulrich* (1893) 145 Ill. 336, 34 N. E. 556; *Peabody v. Wilson* (1895) 82 Md. 186, 32 Atl. 386. See *Sharp v. Ropes* (1872) 110 Mass. 381. 23. *King v. Union Trust Co.* (1909) 226 Mo. 351, 126 S. W. 415; *Hall v.*

to be given a right to enforce the covenants, if such right can be given consistently with principles. Suppose that A owns the original tract and sells one lot to B, and there are mutual covenants exchanged that the lot granted and those retained shall be subject to the same burdens. In such a case it would be held, if A sold other lots, that the grantees of such lots could hold B, and those claiming under him with notice, to the burden originally imposed on B.²⁴ But suppose that A sold a lot to C, after he had sold B his lot, and that C broke his covenant. Could B hold C, or those who claimed under C with notice of the covenant? It is clear that there is no technical privity between B and C, because C never made any agreement whatsoever with B nor could he have, for at the time that B acquired his land, C stood in no relation at all to any of the lots. C, not being at that time an owner, could not have obligated himself with respect to the use that the lots were to be put to. But it is not to be forgotten that A at the time that he granted to B, bound all of the remaining lots for the benefit of B's lot, and it is proper to hold that C took his lot subject to the same burden.²⁵ It could also be said in B's behalf that the covenant, which A exacted from C, was for the benefit of all prior grantees of other lots and that A ought to have a right as a beneficiary to hold C to his obligation.²⁶ This theory of C's liability seems unnecessary and strained, but it is understandable and workable, if a court were disposed to allow a beneficiary to sue under a contract made for his benefit. But some courts do not favor this doctrine.

Occasionally there is a subdivision of real estate into lots for purposes of sale and it is announced that the lots sold are to be subject to restrictions. After such an announcement lots may be sold but the covenants contained in the deeds are not mutual but only binding upon

Wesster (1879) 7 Mo. App. 56; *Hirsey v. Church* (1908) 130 Mo. App. 566, 109 S. W. 60; *Compton Hill etc. Co. v. Strauch* (1911) 162 Mo. App. 76, 141 S. W. 1159; See also *Bub v. McFarland* (1917) 196 S. W. 373; *Bolin v. Tyrel etc. Co.* (1913) 178 Mo. App. 1, 160 S. W. 558; *Thompson v. Langan* (1913) 172 Mo. App. 64, 154 S. W. 808; *Noel v. Hill* (1911) 158 Mo. App. 426, 138 S. W. 364; *Godfrey v. Hampton* (1910) 148 Mo. App. 157, 127 S. W. 626; *Kitchen v. Hawley* (1910) 150 Mo. App. 497, 131 S. W. 142; *Spahr v. Cape* (1909) 143 Mo. App. 114, 122 S. W. 379; *Fete v. Foerstel* (1911) 159 Mo. App. 75, 139 S. W. 820; *Plank v. Eaton* (1905) 115 Mo.

App. 171, 89 S. W. 586; *Doerr v. Cobbs*, *supra*, note 21; *Coughlin v. Barker*, *supra*, note 11. See also accord *Hopkins v. Smith* (1894) 162 Mass. 444, 38 N. E. 1122; *Newberry v. Barkalow* (1909) 75 N. J. Eq. 128, 71 Atl. 752.

24. *Parker v. Nightingale* (1863) 6 Allen (Mass.) 341. See also cases cited *supra* note 23.

25. *Hopkins v. Smith* (1894) 162 Mass. 444, 38 N. E. 1122; *Barrow v. Richard* (1840) 8 Paige (N. Y.) 351, 35 Am. Dec. 713; *Brower v. Jones* (1856) 23 Barb. (N. Y.) 153.

26. *Brower v. Jones*, *supra*, note 25, and see H. F. Stone, *Equitable Rights* 19 Col. Law Rev. l. c. 185 *et seq.*

the grantees. In such a case a question might arise whether a subsequent grantee would be bound in favor of a prior grantee who bought his lot with the understanding that all lots were to be burdened. If no covenant was exacted from the subsequent grantee, the only basis for holding him would be that the original owner, when he made his grant to the first taker, under an announcement that all lots were to be restricted, by implication agreed that the lots retained by him would be subject to the same burden as was imposed on the lot granted to the prior grantee. It would seem that such an implied covenant on the part of the original owner would be entirely proper, and if it were implied, a subsequent grantee who took with notice of the burden would be bound whether he expressly covenanted to be so bound or not.²⁷ This obligation would be on the basis heretofore stated, namely, that as the original owner held the land subject to the burden, all holding under him other than *bona fide* purchasers should be equally bound.²⁸ If the last suggestion is sound, and a subsequent grantee who takes without a covenant imposing the burden is bound to a prior grantee, it would follow all the more easily that a subsequent grantee, who did covenant that his lot should be burdened would be bound in favor of a prior grantee. In such a case not only would we have the same basis for holding that the original owner by implication bound the lots retained in favor of his first grantee that we had in the first assumed case, but also we would be able to hold that the covenant exacted from the subsequent grantee was taken for the first grantee's benefit.²⁹

It has been held that a covenantee may enforce the equitable burden

27. *Maxwell v. East River Bank* (1858) 3 Bos. (N. Y.) 124, 16 N. Y. Sup. Ct. 124; *Spicer v. Martin* (1888) L. R. 14 App. Cas. 12; *McDougal v. Schneider* (1909) 118 N. Y. Sup. 861. See also *Semple v. Scwors* (1908) 130 Mo. App. 65, 109 S. W. 633, where the suggested result was reached but the court did not discuss the problem. See further *Coughlin v. Barker*, *supra*, note 11; *Hirsey v. Church* and *King v. Union Trust Co.*, *supra*, note 23. In *Doerr v. Cobbs*, *supra*, note 21, it was held that if there had been a building scheme, a prior grantee could have held a subsequent grantee to his covenant.

28. See *supra* note 25.

29. See *supra* note 26 and accord *Merrimether v. Joy* (1900) 85 Mo. App. 634. Cf. *Reed v. Hazard* (1915) 178 Mo. App. 547, 174 S. W. 111; *Miller v.*

Klein (1913) 177 Mo. App. 557, 160 S. W. 562.

Suppose that one of the lots sold under a building scheme is subdivided and built upon by both owners, both of whom have taken with knowledge of the restriction. It has been held that if one of the owners violates the restriction the other has no remedy. It is said that the restrictions are imposed not to benefit portions of any one lot but merely to benefit other lots. *King v. Dickerson* (1889) 49 Ch. 596. See also Stone, *Equitable Rights*. 19 Col. Law Rev. 1. c. 188. Might not this decision have been the other way? It is suggested that it could have been assumed that the parties intended (as each subdivision was bound for the benefit of other lots) that each subdivision should be bound for the benefit of the other subdivision.

where the servient estate is in the hands of a disseisor.³⁰ This case with other reasons has led certain scholars to suggest that the nature of the covenantee's right is *in rem*.³¹ The underlying reason for such a contention is that the disseisor can in no way be connected with the covenant and that, therefore, the right of the covenantee must be assimilated to legal ownership. It is said that the position of the covenantee is so similar to that of the owner of an easement that the rights of the two parties are practically identical and that both must be classified as rights *in rem*. On the other hand serious exception has been taken to such a contention and it has been denied that the covenantee has anything but a right *in personam*.³²

In all cases where a person has a specifically enforceable equity there is a right "*in personam ad rem*," which right will be enforced as against the *res*, through the holder of the same for the time being, whenever it is just that such a duty should be imposed. So, where land is held subject to such an equity, the equity is enforceable not only against the original obligor but against all who claim under him with notice and all who claim under him without notice, not purchasers for value. Suppose that A' has a right to a conveyance of land from B and that the land comes into the possession of C, who is either a *mala fide* purchaser or an heir of B, or a donee of the latter. In each case A' could compel a conveyance from C. This would not be because A had title to the land but because of A's original equity it would be unjust to permit C to keep the same. So, too, if C had the land by adverse possession a conveyance could be compelled at the instance of A. This being the case it would be correct to say, not that A owned the property but that by reason of his equity he had a right as against an "indeterminate number" of people to prevent interference with his specifically enforceable equity and that if anyone in that class did interfere, to compel a performance of the equitable duty by such an intermeddler.³³ It is submitted that the situation of the covenantee is the same as that of A in the above supposed case. The covenantee has no legal ownership of the burden imposed. He has not an easement but he has a right "*in personam ad rem*," a right to compel any person, who holds the property burdened or owns the same, to perform the burden, unless there is an overpowering equity

Such an assumption would seem to accord with an ordinary man's expectations. The buyer knows that each subdivision is restricted. So does the seller. Does not the buyer reasonably assume that the restriction is for the benefit of his subdivision as well as for the benefit of outside lots?

30. *Re Nisbett and Potts Contract* (1906) 1906 1 Ch. 383.

31. A. W. Scott, *Nature of the Rights of the Cestui*, 17 Col. Law Rev. 1. c. 285.

32. H. F. Stone, *Nature of the Rights of the Cestui*, 17 Col. Law Rev. 1. c. 482.

33. H. F. Stone, *Equitable Liabilities*, 18 Col. Law Rev. p. 299, *et seq.*

in favor of the latter. Normally the only equity of such a nature is that which is possessed by a *bona fide* purchaser for value. In all other cases the holder or owner of the burdened property is either aiding the original covenantor in a breach of his obligation or else is unconscionably but consciously himself interfering with and preventing the covenantee from getting the fruits of his bargain.

It is now proper to determine whether the right of plaintiffs in the case under review was of such a nature as to justify its being classified as property and for the taking of which there should be compensation. Naturally, if we adopt the suggestion that the right is one *in rem*,³⁴ we should hold that the school district should pay for the value of the restrictions. The principal case is in accord with this proposition, and there are three other decisions known to the writer which take the same position.³⁵ But even if one were not inclined to go so far as to say that plaintiffs' right is a strict property right, it is not believed that such disinclination ought to lead to a different result. The word "property" in the constitution ought not to be given a narrow and technical meaning but ought to be held to mean every valuable *proprietary interest* which is susceptible of enjoyment. Surely the right of plaintiffs is of such a nature and it seems that courts should protect the same even though it is not a true easement. Some courts, however, have held that the right of a covenantee is not a true property right and that therefore if it is taken by the government no compensation is due. In *U. S. v. Certain Lands*,³⁶ the federal government sought to condemn land for coast defense purposes. The land to be taken was subject to restrictions against carrying on any trade thereon and the owners of these restrictive rights claimed compensation. The court held that the erection of the coast defense would not be a violation of the restrictions, as it would not constitute carrying on a trade; but also held that even if the erection would be a violation of the restriction the owners would not be entitled to compensation, because the covenant was against public policy. It was stated that the claimants did not have any property right by virtue of these restrictions as they were given "no right to go on the lands taken or use them";³⁷ that all the claimants had was an agreement that the lands should not be used in a certain way, which in this *particular* case amounted to an agreement that the federal government should not have the power to take and use the land for proper governmental purposes. Such a contract was said to be against public policy. The decision of the Cir-

34. *Supra*, note 31, and see 17 Col. Law Rev. 1. c. 281.

35. *Flynn v. R. R. Co.* (1916) 218 N. Y. 140, 112 N. E. 913; *Hays v. Waverly* (1893) 51 N. J. Eq. 345, 27 Atl.

648; *Allen v. Detroit* (1911) 167 Mich. 464, 133 N. W. 317.

36. (1899) 112 Fed. 622.

37. 112 Fed. 1. c. 628.

cuit Court was followed by the Circuit Court of Appeals in the same case³⁸ and has been adopted by the Supreme Court of Ohio in two similar cases.³⁹

It hardly seems possible that the line of reasoning put forward by the learned courts in the above cited cases can be sound and the result seems unjust. In every case where the government exercises a right of eminent domain it is permitting the owner of the property to say: "I have purchased a right to prevent you from exercising your governmental capacities. I cannot prevent this altogether, but I can, because of the constitution, make you purchase this right". In other words, the constitution contemplates that the government shall pay for privileges of this kind which it takes, and the government has no grounds for complaint just because to this extent its activities are hampered and fettered.

Suppose that a man has an easement of light and air; suppose that the government destroys the same by taking the servient estate; it has been held that the government must pay the owner of the dominant estate the value of his easement.⁴⁰ Now if the owner of such a dominant estate is allowed compensation, the court awarding the same will be doing just what the court in *U. S. v. Certain Lands* says ought not to be done. After all, what is an easement of light and air, aside from technical rules of conveyancing? It is nothing but an agreement that the owner of the servient estate will not build in such a way as to keep out sunlight and air. Is it not an agreement to the effect that the government, if it needs the land, will not take or destroy the right without paying for it? Does not a court which allows damages for such an easement validate the agreement? Of course, it can be said that the owner of the easement has a right *in rem*, although in this case he cannot go on the land of the servient tenement. But even so, this right *in rem* in the way that it operates does not differ materially from the right *in personam*, which the owner of the restrictive covenant has. Each is a valuable right susceptible of proprietary enjoyment and should be paid for, if taken, unless the law of eminent domain is to be based on technicalities and distinctions where there are in truth no substantial differences.⁴¹

B. E., Jr.

38. (1907) 153 Fed. 876.

39. *Dene v. R. R. Co.* (1915) 92 Ohio St. 461, 112 N. E. 505; *Ward v. R. R. Co.* (1915) 92 Ohio St. 471, 112 N. E. 507.

40. *Ladd v. City of Boston* (1890) 151

Mass. 585, 24 N. E. 858.

41. For two articles dealing with the nature of restrictive covenants, see H. F. Stone, 19 Col. Law Rev. 177, and G. L. Clark, Univ. of Mo. Bull. 16 Law Series 3.

BAR BULLETIN

EditorKENNETH C. SEARS

Associate Editor for Bar AssociationW. O. THOMAS

OFFICIAL PUBLICATION OF THE MISSOURI BAR ASSOCIATION

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MISSOURI BAR ASSOCIATION

The annual meeting of the Missouri Bar Association was held in Kansas City December first and second. The members were appropriately welcomed by Mr. Newton L. Wylder, the active and energetic president of the Kansas City Bar Association. The welcome was gracefully accepted by Mr. A. T. Dumm of Jefferson City, of whom it was said that he was not only a member of the association but an "institution" as well. The truth of the remark was demonstrated when it was announced that through his efforts every member of the Jefferson City bar had become a member of the Missouri Bar Association.

The address of President Curlee was admirable because of its frankness and style. He announced that once again the lawyers of St. Louis and Kansas City had given financial assistance to the Association. When he assumed office there was a note of the Association which now amounted to about one thousand dollars. He had six hundred dollars, a gift from the St. Louis Bar Association, and had been promised four hundred dollars from the Kansas City Bar Association. With this assistance he hoped to leave the Association free from any except current indebtedness.

President Curlee demonstrated that the Association would always

be in a chronic state of insolvency unless a different policy be adopted for the future. An increase in membership, he pointed out, would only cause additional financial embarrassment. Through the kindness of Mr. Dutton he presented figures to show the cost *per capita* to be as follows:

Banquet	\$2.60
Collecting dues90
Year book	1.60
Bar Bulletin54
Miscellaneous63
<hr/>	
Total	\$6.27

If the annual dues are only five dollars, a deficit is inevitable. Furthermore, he said, Mr. Jacob Lashly had faithfully tried to obtain new members and his efforts had cost one dollar and fifty cents for each member obtained. This expense was generously borne by Mr. Lashly, personally, but such generosity is not to be expected in the future.

Consequently, the President presented three alternatives: (1) The Association be conducted as in the past, i. e., with an annual deficit and a big program but with slight accomplishments; (2) the Association be changed into a mere social organization; (3) make the Association into an effective organization by increasing the annual dues to twenty-five dollars, and establish a permanent office (preferably at the state capitol), with a permanent secretary who would be qualified to look after legislation, publicity, membership, dues, and bar bulletin. Such a man he thought could not be secured for less than an annual salary of five thousand dollars.

President Curlee argued that the third alternative be adopted. He pointed out that every successful trade organization had found a similar plan necessary. He also referred to the fact that there was a movement under way to incorporate the bar in various states by legislation. Such had been done in Florida and the annual dues there were twenty-five dollars; such a plan was necessary to revive the influence of the bar in public affairs, to decrease the hostility to courts and lawyers and to make the bar effective in securing the proper sort of legislation.

The proposal of President Curlee may be epoch-making. It produced considerable discussion, with the result that a committee was appointed to consider the whole problem of the future policy of the Association. Later the committee reported amendments to the by-laws which had the following effect: (1) to increase the annual dues from five to ten dollars; (2) to provide that the annual banquet will be paid for hereafter by the members attending and not by the Association; and (3) to pro-

vide that a permanent office should be established at the state capitol. The recommendations of the committee were adopted after long debate and the committee was continued to consider other plans.

It might be suggested here that the committee might well consider a plan to consolidate the various bar associations in Missouri into one organization. It is believed that lawyers are asked to join too many organizations, i. e., the local, state and national associations and then various special organizations such as the Commercial Law League. It would seem more satisfactory to have a single state organization with only one demand for dues. Of course, local organizations would be necessary but they would be branches or chapters of the state organization. Surely some arrangement could be made for apportioning the funds as needed to carry on useful work. It is believed by this means dues of ten dollars annually would be a relief to most lawyers and at the same time better results could be obtained.

The members were generously and hospitably entertained the evening of December 1 by the Kansas City Association at the Mission Hills Country Club. After a splendid dinner, Judge Henry I. Green of Urbana, Illinois, gave an address on "The Work of the Illinois Constitutional Convention." Judge Green proved to be a conservative but his audience was a conservative audience judging from the applause given him. His address was well received. It was reassuring to hear from him that no purely partisan issue had crept into the Illinois Convention in spite of the fact that eighty-five members were Republicans and seventeen were Democrats. There was pleasure in hearing him announce that the proper ideal for a constitution is a short one of fundamental propositions without attempt to handicap the legislature by detailed and various limitations on its power. Nevertheless, he viewed as a radical suggestion that an indictment by grand jury should not be required by the constitution in order to prosecute for criminal offenses. We in Missouri have learned from experience that the danger of prosecution by information is largely imaginary and that the grand jury system is only desirable as an aid in uncovering crime in difficult situations.

It was interesting to hear Judge Green say that one of the two dominant reasons for a constitutional convention in Illinois was the realization that the present constitution by requiring that all property be taxed uniformly had only succeeded in driving intangible property into hiding. The same problem will no doubt be before the convention in Missouri. Shall we recognize the inevitable or shall we deceive ourselves into thinking that a threat of a sentence to the penitentiary will bring forth intangible property in order that it may be subjected to what the

owners regard as virtual confiscation? (Cf. Graves, J., in *State ex rel. Tompkins v. Shipman*, 234 S. W. 1 c. 65.)

Mr. John M. Atkinson presented a report of the special committee on constitutional revision. It reviewed the work that had been done and recommended that the committee be continued to finish the work. Thus, no attempt was made to secure indorsement for the proposed judiciary article. Nevertheless, a debate arose for fear that the action requested would be construed as an indorsement of the proposed article. The Association voted to continue the committee with the express understanding that its recommendations should be passed upon by the Association before submission to the constitutional convention.

The special committee appointed to consider participation by the Association in the selection of judicial officers submitted an amendment to the constitution and, as amended, is as follows:

"The committee on Judicial Candidates consisting of eight members shall meet at the call of the chairman prior to the primary nomination or appointment of any person as a member of any state appellate or any federal court in this state. The chairman shall invite like committees of local bar associations in this state to join in the deliberations. The joint organization shall determine the advisability of making recommendations to the appointing power or to the voters in a primary election as to the fitness of judicial candidates. Such organization may also consider means of securing men of proper qualifications as candidates for such offices.

"In case the joint organization deems it advisable to make recommendations it shall first proceed, whenever feasible, to get an expression of the opinion of all of the members in good standing of the Missouri Bar Association and such local bar associations as may be represented at the joint organization. The expression shall be obtained by distributing ballots which shall be signed by the person voting and shall not be counted unless so signed. No person shall be entitled to more than one vote even though he belongs to more than one association represented in the joint organization.

"The joint organization shall provide for counting the ballots and its recommendations shall be in accordance with the expression thus obtained. In distributing the ballots there may accompany each ballot a statement concerning the persons under consideration; such statement shall be impartial and fair and shall be formulated for the purpose of informing the voter of the qualifications of any candidate for judicial office, including his education and experience at the bar and on the bench.

"The ballots shall be so arranged that a voter may express himself

as believing that more than one, or that all, of the candidates are fitted for any particular office.

"After all need for the ballots has passed it shall be the duty of the Committee on Judicial Candidates to entirely destroy them. No member of the joint organization or the committee which shall count the ballots shall disclose how any ballot was marked.

"The report of the organization shall be given publicity prior to the appointment or primary election.

"The joint organization shall have power to make by-laws, not inconsistent with, and for the purpose of carrying out the foregoing provisions."

The amendment was adopted by an overwhelming majority.

The various committees then submitted their reports. The reports evidenced activity and preparation but on every side there was a demand for a representative who could look after the interests of the Association at Jefferson City while the Legislature is in session.

The Council presented the name of Mr. Charles W. German of Kansas City for the next president and the presentation was greeted with genuine applause. It was no doubt a recognition of the splendid and unselfish work Mr. German has done for the Association in the past and there is every reason to expect that he will make an excellent leader for this year.

Mr. John T. Barker of Kansas City presented a resolution expressing a desire for a meeting of the Association in Jefferson City next summer. It was adopted. It was thought that the constitutional convention will have been organized by that time. There was also a feeling expressed that it may be a mistake to have the annual meeting late in the fall while lawyers are busy in court.

Judge Thomas Buckner of Kansas City offered an amendment to the constitution to provide that the officers of the Association shall be nominated and elected in open meetings. While it seems strange that it could be seriously thought that the Association is undemocratic in its organization and practice, still if that impression is widespread it should be removed. The amendment should be adopted if it will counteract that feeling. It was not acted upon. The author said he would bring it up for action at the next meeting if it does not become a part of the program of the committee on future policy of the Association.

Columbia, Missouri

KENNETH C. SEARS

THE INDEX TO LEGAL PERIODICALS

In a letter circulated among the secretaries of the state bar associations, the American Association of Law Libraries, by its Committee on Index to Legal Periodicals, calls attention to the place of the Index among legal publications and makes an appeal for support in a financial way. Careful examination of what the Index is, its aims and the place it fills in the office of the attorney and in the law library will suffice to prove that such an appeal for support should be answered and that its claims upon the profession are fully justified.

In January, 1908, the first number of the Index to Legal Periodicals appeared. Up to that time but one index to legal periodical literature had appeared—Jones' Index to Legal Periodicals—a two volume set which covered the period up to the year 1899. The American Association of Law Libraries, realizing the importance of a work of this type which would also serve as a supplement to Jones' Index, resolved to undertake its publication, and up to the present time some fourteen yearly cumulative numbers have been published, in addition to quarterly numbers which supplement the cumulative ones and keep the Index to date. Both quarterly and annual numbers contain an index by subject and by author, and in addition a table showing the cases which have been reviewed or commented upon in legal periodicals and where such articles may be found. Another table gives the latest volume of the reports of each state set to be published, the latest volume of session laws and the source of supply of each.

The classification scheme used is based largely upon that of the American Digest System, with which many lawyers are already familiar, so that the user need only turn from the general Digest heading with which he has been working to the same heading in the Index to locate a periodical discussion upon the subject in which he is interested. Approximately seventy legal and quasi legal periodicals are indexed, constituting the entire list of legal periodicals of a general nature printed in the English language. Thus it will be seen that the contents of all current legal publications are made readily available, including the discussion of current cases so valuable to the practicing lawyer. It is also possible for any official or member of a state bar association or of the American Bar Association to keep in touch with the work of other associations as represented by the papers presented at their meetings, published in their reports and perhaps reprinted in periodicals. By the recent publication of a supplement to Jones' Index the gap between Volume 2 and the first volume of the Index to Legal Periodicals is closed, thus placing all periodical material to date in usable form. Under pres-

ent plans the cumulative annual numbers are to be combined in one alphabet, making the contents available at a considerable saving in time and labor.

Up to the present year the funds of the Association—the income received from the dues of a membership of only slightly over one hundred and whatever return was received from the Index itself—have been expended in publication. The increase in printing and binding costs in the past two or three years is a matter of common knowledge. The Index to Legal Periodicals has been so affected by these conditions that in spite of a substantial increase in membership and corresponding increase in income, it is no longer possible for the Association to continue its publication without financial assistance from outside sources. A committee has been authorized to confer with officials of the American Bar Association on this subject and steps are also being taken to bring the matter to the attention of the state bar associations.

In view of the very evident value of the Index to Legal Periodicals to the legal profession generally as well as the librarian and law teacher and the efforts which have been made by the American Association of Law Libraries to sustain publication of the Index at considerable sacrifice, it would seem that the Association is warranted in their appeal to the profession for assistance. It is to be hoped, therefore, that the response may be so general that continued publication of the Index to Periodicals may be assured. Any Missouri lawyer who is interested in the Index and its work may secure additional information by communicating with Mr. Franklin O. Poole, 42 W. 44th St., New York City, who is Chairman of the Committee on Index to Legal Periodicals, of the American Association of Law Libraries.

Columbia, Missouri.

PERCY A. HOGAN

TRIBUTE TO AMERICAN JURIST—"It is one of my earliest recollections of the practice of the law how the English Court of Appeal was convinced by reference to a chapter in Mr. Justice Holmes' profound and masterly analysis of the Common Law, that a previous decision of the English High Court was wrong, and that the true principle was to be found expounded in his luminous treatise."—Sir John A. Simon, K. C., Am. Bar Association Meeting.

LEGAL EDUCATION

At the meeting of the American Bar Association held at Cincinnati, August 31 to September 3, 1921, a special committee to the section of legal education and admission to the bar made a significant report and recommended as follows:

"(1) The American Bar Association is of the opinion that every candidate for admission to the bar should give evidence of graduation from a law school complying with the following standards:

"(a) It shall require as a condition of admission at least two years of study in a college.

"(b) It shall require its students to pursue a course of three years duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only part of their working time to their studies.

"(c) It shall provide an adequate library available for the use of the students.

"(d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

"(2) The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness.

"(3) The Council on Legal Education and Admission to the Bar is directed to publish from time to time the names of those law schools which comply with the above standards and of those which do not and to make such publications available so far as possible to intending law students.

"(4) The president of the Association and the Council on Legal Education and Admission to the Bar are directed to cooperate with the state and local bar associations to urge upon the duly constituted authorities of the several states the adoption of the above requirements for admission to the bar.

"(5) The Council on Legal Education and Admission to the Bar is directed to call a Conference on Legal Education in the name of the American Bar Association, to which the state and local bar associations shall be invited to send delegates, for the purpose of uniting the bodies represented in an effort to create conditions favorable to the adoption of the principles above set forth.

"Elihu Root, Chairman, New York, N. Y.

"Hugh H. Brown, Tonopah, Nev.

"James Byrne, New York, N. Y.

"William Draper Lewis, Philadelphia, Pa.

"George Wharton Pepper, Philadelphia, Pa.

"George E. Price, Charleston, W. Va.

"Frank H. Scott, Chicago, Ill."

After full debate in the section and before the entire association, the recommendations were adopted. The opposition seemed to come chiefly from representatives of certain night schools. Mr. Elihu Root approved them in the following manner:

"It is a question whether we are to have any standards at all. Of course, if there is to be a standard, the line must be drawn somewhere. Wherever it is drawn, there will be somebody who will be inconvenienced. I should be sorry to have the gentlemen representing law schools that do not care to conform to this standard inconvenienced, but I care a great deal more about the honor and the dignity of the American Bar than I do about their convenience. I care more about having the Bar an agency competent to secure effective administration of justice in this disturbed country than I do about those gentlemen's convenience. I care more about having some body in America, some organized body, with the courage and the decision of character that makes it competent to meet the new conditions that confront us, and which are tending to bring the Bar and the administration of the law and the law itself into disrepute and ineffectiveness. I care more for that, than I do, sir, about the inconvenience of how-ever close a friend."

Mr. Chief Justice Taft answered the argument most often used by opponents to any progress.

"Everyone, immediately upon reading these requirements, begins to make personal application, and the man who leads in the bar of his own state will say: 'Well, I never had two years of college education; therefore, why should I require it of everyone else?'; the argument that Abraham Lincoln, one of the greatest lawyers we ever had, and who would have made one of the greatest Chief Justices the country ever saw, did not have the benefit of such an education as is here recommended. But those were exceptions, and we must make law for the benefit of all, and it is not a question of the personal ambition, or the personal coming to the front of the individual, but it is the question of saving society from the incompetent, the uneducated, and the careless, ignorant members of the bar, who have

intrusted to them the fortunes and the lives of the public in the protection of their rights."

Mr. Alexander H. Robbins of St. Louis carried the argument further.

"This report does not, as some of the gentlemen here would seem to think, set up an impossible standard that would enable some of these schools to form a trust. This standard is not a prerequisite for admission to the bar, unless the states have made it so by law. This is a minimum standard from the standpoint of the need of the profession today, and not what it was fifteen or twenty years ago. There are some men here who had not these advantages, and some of them feel that they ought not to consistently ask the young men coming to the bar today to meet any higher standards than they themselves met.

"But conditions are different today than they were twenty-five years ago. If you will look over the members of the profession in any of the large cities of this country, you will observe that the men who are bringing discredit upon the profession are, in nine cases out of ten, men without any college education.

"I tell you that a man who goes to college for two years or three years, a man who has character enough to give up some of the best years of his life to a preparation for the study of law, is not going to degrade the standards of his profession. That is the best moral test you can lay down. You can, many times, tell the character of a young man by what he is willing to do in order to get into the profession. I was chairman of a committee of our local bar association to investigate the practice of law by laymen, and I discovered that there were more men than I thought existed, who were living outside the law and who were using certain members of the profession in personal injury litigation.

"Now, it is to keep out of the profession men whose moral standards are like that that this proposition is laid before us."

Missouri only requires a grammar school education and no legal education in order to be eligible for admission to the bar. Should she not at the earliest possible moment set herself right? Observe what a neighboring state has done.

William Hutchinson, of Kansas: "I am not rising to bring my own opinion in indorsement of this recommendation in full, but to bring to you the unanimous opinion of the entire State Bar Association and of the Supreme Court of our state. Last November our Bar Association unanimously indorsed the resolution, in substance, which

has been proposed here, making two years in college a necessary requirement to the study of law, and three years of study in a college.

"Our Supreme Court in January last promulgated a rule putting that requirement in force—to take effect, however, in the future."

RESPONSIBILITY FOR JUDICIAL RESULTS—"We have a great many complaints of the failure of justice in trials which have great publicity and in which the jury does not seem to do its duty. That subject I discussed in a paper read before the Bar Association in Montreal. I merely wish now to emphasize the fact that if legislatures take away the power of judges to conduct trials as they ought to be conducted, and as they have been conducted in English courts of justice and in federal courts of justice since their organization, and reduce the judges to a mere moderator, the complaint of results should not be laid at the door of the judiciary—it must rest with the legislature. The members of the profession, however, cannot escape criticism in the same way. With one or two exceptions, every state legislature is full of lawyers and the profession has a very great power, if it would exercise it, to perfect the machinery for the administration of justice. But too often lawyers in the legislature have allowed themselves to be influenced by personal considerations, by small jealousies of the power of judges, and by shaping the administration of justice to suit the character of their particular practice. It is important that the responsibility for unsatisfactory legal procedure should be put where it belongs, and much of it, I am sorry to say, is due to the members of the profession who do not do credit to the profession in the discharge of their political duties in this regard."—Mr. Chief Justice Taft, in Vol. VII, p. 454, *Am. Bar Assoc. Journal*.

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BAR BULLETIN

CERTIORARI AS USED BY THE SUPREME
COURT IN THE INTEREST OF HAR-
MONY OF OPINION AND UNI-
FORMITY OF THE LAW.

BY

WALLER W. GRAVES

NOTES ON RECENT MISSOURI CASES



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CERTIORARI AS USED BY THE SUPREME COURT IN THE INTEREST OF HARMONY OF OPINION AND UNIFORMITY OF THE LAW.

I

GENERAL OBSERVATIONS

It is not my purpose to discuss the writ of certiorari in general, but only such writ as used by the Supreme Court and as directed to the several Courts of Appeals in the interest of harmony of the case law of the state. But whilst this is the purpose I have in mind, yet some general thoughts are not inappropriate.

In Missouri we have no general statutes covering the subject of certiorari, as we have covering prohibition, mandamus, habeas corpus and quo warranto. In most respects we use the writ as recognized at common law, and it is no doubt true that when the constitution of 1875, sec. 3 of art. VI, speaks of certiorari, it was used in the common law sense of that term. In many states, by statute the old common law writ has been curtailed, and in others enlarged. And in England Acts of Parliament have changed in some things the old common law certiorari. Even in Missouri we have some statutes providing for certiorari in given cases. Section 3031 R. S. Mo., 1919, provides for the removal by certiorari of proceedings in the courts of Justice of the Peace to the Circuit Court in cases of forcible entry and unlawful detainer. Section 7336, R. S. Mo., 1919, allows the physician whose license to practice has been revoked by the State Board of Health to proceed by certiorari to the Circuit Court. So also the Public Service Commission Act, Laws of 1913, secs. 111-113, p. 641, provides for a species of certiorari. But outside of a few statutes of the character named, this state has the common law writ of certiorari. It has no doubt been modified in a way by case made law. This writ has been defined in Bacon's Abridgment, Vol. 1, p. 559 (5th Ed.) thus:

"Certiorari is an original writ issuing out of Chancery, or the King's Bench, directed in the King's name, to the judges or officers of inferior courts commanding them to return the records of a cause depending before them, to the end the party may have the more sure and speedy justice before him, or such other justices as he shall assign to determine the cause."

Tidd's Practice gives this definition:

"A certiorari is a writ issued from a superior court to an inferior court, tribunal or officer exercising judicial powers, whose proceedings are summary or in a course different from the common law, commanding the latter to return the records of a cause pending before it to the superior court."

Bailey in Vol. 1, p. 621, gives this idea of the writ from the American view point:

"The purpose of the writ is to have the entire record of the inferior tribunal brought before the superior court, to determine whether the former had jurisdiction or had exceeded its jurisdiction or had failed to proceed according to the essential requirements of the law."

At common law it was not a writ of right, but its issuance was within the discretion of the court to which application was made.¹ And so far as Missouri is concerned, the common law writ of certiorari may be classed as a discretionary writ, rather than a writ of right. Its purpose is not to take the place of an appeal or writ of error, but to reach those cases where there is no appeal or writ of error. At common law there was no appeal, but there was a writ of error, and as a rule the writ of certiorari would not be granted where a writ of error could have been invoked. The writ, so far as used in this state, is not designed to bring up for consideration mere errors in the course of a trial, such as are heard upon appeal or writ of error. The purpose is to bring to the superior court the record of the inferior court to the end that it may be determined whether or not the inferior court was without jurisdiction, or if it had jurisdiction, whether or not it has proceeded according to law, and kept within that

1. Harris on Certiorari, sec. 3, p. 4.

jurisdiction.² At common law, in England, and even in this state the writ has been used to bring up a case to be tried upon its merits in a higher court.³ And the case was determined there.⁴ There was, however, a statute which authorized the transfer, if such statute was constitutional. The constitutionality of the statute was raised but the writ seems to have been granted upon common law rules.

In the *Dawson case*, *supra*, Black, J., used language which perhaps is better than ours upon this point, and I quote thus:

"But it cannot be said that the writ will be issued only in those cases where the lower court has no jurisdiction whatever over the case before it. High says: 'The province of the writ is not necessarily confined to cases where the subordinate court is absolutely devoid of jurisdiction, but is also extended to cases where such tribunal, although rightfully entertaining jurisdiction of the subject-matter in controversy, has exceeded its legitimate powers'."

Judge Black had before him a case in prohibition, but in *State ex rel v. Smith*⁵ the Supreme Court applied the same doctrine in certiorari. I may add that what can be reached by prohibition before the lower tribunal acts may be reached by certiorari after the court has acted.

It is perhaps needless to say that such writ only brings up the record of the lower court or tribunal for review by the superior court⁶. And usually this is after a final disposition of the case in the lower court.

With these general observations, I shall proceed to the real subject I have in mind, i. e. the writ of certiorari, as used by the Supreme Court of Missouri in the interest of harmony of opinions and uniformity of the law.

2. *State ex rel. Dawson v. St. Louis Court of Appeals* (1889) 99 Mo. 1. c. 221, 12 S. W. 661; *State ex rel. v. Smith* (1903) 176 Mo. 1. c. 99, 75 S. W. 586.

3. *Rector v. Price* (1822) 1 Mo. 198.

4. *Rector's Adm'r. v. Price* (1823) 1 Mo. 373.

5. (1903) 176 Mo. 1. c. 99, 75 S. W. 586.

6. *State ex rel. v. Smith* (1903) 176 Mo. 1. c. 99, 75 S. W. 586.

II

HISTORY OF THE WRIT

The writ of certiorari as now used for the review of opinions of the several Courts of Appeals has had a somewhat checkered career. The Supreme Court first asserted this right in the case of *State ex rel. Curtis v. Broaddus*⁷. Prior to that time it had not asserted it, but on the other hand had denied the right. The cases will be found collected in the dissenting opinion of Bond, J., in *State ex rel. v. Robertson*⁸. These earlier cases were mostly mandamus or prohibition cases, but after the constitutional amendment of 1884, certiorari was specifically denied in *State ex rel. v. Smith et al.*⁹ Shortly thereafter, however, there was a vigorous dissent to the first ruling, and Judge Sherwood, who wrote the opinion in *State ex rel. v. Smith, supra*, joined in this dissent. Both he and Judge Thomas concurred in the dissenting opinion of Gantt, J., in *State ex rel. v. Smith*¹⁰, where the following significant language appears:

"Section 8 provides: 'The Supreme Court shall have superintending control over the courts of appeals by *mandamus*, prohibition and *certiorari*!' The history of this amendment is so recent that its object is well known. Owing to the crowded condition of the docket of this court at that time, an effort was made to relieve it by the creation of these courts of appeals. This amendment had two main purposes in view. One was to relieve the overcrowded docket of this court, and to prevent delays in the administration of justice; the other was to keep these courts of appeals in accord with each other in their decisions, and with the rulings of this court. Hence it is made the duty of either of said courts when one of the judges sitting therein shall deem one of its decisions contrary to any previous decision of any one of said courts or of this court to certify the transcript to this court.

7. (1911) 238 Mo. 189, 142 S. W. 340.

8. (1916) 264 Mo. 1. c. 681-2, 188 S. W. 101.

9. (1890) 101 Mo. 174, 14 S. W. 108.

10. (1891) 107 Mo. 1. c. 533, 16 S. W. 401.

"Previous to the adoption of this amendment an appeal would lie from the St. Louis Court of Appeals to this court. It seems clear that the legislature when it submitted this amendment and the people when they adopted it, intended and designed that every citizen and litigant should have the equal protection of the law within this state, and there should be uniformity in the administration of justice. Had it been understood that one tribunal in the eastern portion of the state could declare the law one way and another tribunal in the western portion, another way, and that no provision was made to prevent such a result, in our opinion the amendment would have been defeated. But the sixth section commended it to the bar and the people alike, because by it it was thought a simple mode was provided to insure uniformity in the decisions of all the courts; and to provide against oversight or error this court was made the final arbiter, with power of superintendence over all inferior courts, and courts of appeal especially, with power to issue writs of *mandamus*, prohibition and *certiorari*."

It is true that this case was a *mandamus* case against a court of appeals, but the reasoning of the matter is pertinent here. These three members of the court as then constituted, Sherwood, C. J., Gantt and Thomas, JJ., were of the opinion that one of the purposes of the amendment of the constitution in 1884 was to secure harmony in the law and in the judicial opinions of the state. They went so far as to say that such amendment would not have been adopted, but for this understanding. The significant portion of Judge Gantt's opinion is in the words: "and to provide against oversight or error this court was made the final arbiter, with power of supervision over all inferior courts, and courts of appeals especially, with power to issue writs of *mandamus*, prohibition and *certiorari*."

It must be borne in mind that he was discussing a case wherein there was an alleged conflict of opinions between the Supreme Court and one of the Courts of Appeals. So that it will be seen that the rule announced, which precluded the Supreme Court from reaching the Courts of Appeals when there was con-

flict of opinions was not one established in unanimity of thought among the judges. Suffice it to say that it was established and remained until the *Curtis* case mentioned before. The writer had the pleasure of being admitted to the bar by Judge Gantt whilst he was a circuit judge and lived within the same circuit in adjoining counties. I served upon the supreme bench with him later, and know that he never gave sanction to the first rule, but followed it because it had been announced by the majority. No judge of the Supreme Court would have been more gratified at the rule now prevailing and first announced in the *Curtis* case, than Judge Gantt, had he served long enough to have participated in the *Curtis* case. I feel that I can authoritatively say that he never departed from the views expressed in his dissent. He only yielded to the majority view in later opinions. While the first rule was not one born in unanimity of thought, the same can be said of the rule having its origin in the *Curtis* case. There has been, and there is now, diversity of thought upon the propriety of our present writ of certiorari among the judges of the Supreme Court. This appears from the opinion of Woodson, C. J., in *State ex rel. v. Robertson*¹¹, where he announces for the first time his submission to the present rule, rather than his acquiescence therein. From the announcement of the principles to the effect that the Supreme Court could and would, under its writ of certiorari, bring before it the opinion of a court of appeals, and quash said opinion and the judgment founded thereon, as expressed first in the *Curtis* case, there was a long drawn out fight for the maintenance of the rule. Every time a new face appeared upon the Supreme Court, interested lawyers renewed this fight, but it finally culminated in the case of *State ex rel. v. Robertson, supra*, wherein Woodson, C. J. yielded his personal views to those of the majority, and wherein by four concurrences, the separate concurring opinion of the writer once for all, again announced the fact that under the superintending control given the Supreme Court by the Constitution, such court could by its writ of certiorari bring before it the record (which

11. (1916) 264 Mo. 1. c. 668, 188 S. W. 101.

under the constitution, sec. 15, art. 6 includes the opinion) of a court of appeals, and quash such record, including both the opinion and judgment entered thereon. Since this case there has been substantial unanimity of opinion in the Supreme Court. I say substantial, because it should be noted that our lamented Judge Bond to the day of his death opposed this assertion of power of the Supreme Court. The reasons for the rule I shall discuss but slightly, because I exhausted my thought upon that question in *State ex rel v. Robertson*¹², and those interested can read for themselves.

Before passing to the reasons for the present rule it will not be improper, I trust, for me to say that I came to the Supreme Court thoroughly convinced that the Supreme Court not only had the constitutional power and right to review the opinions of the courts of appeals, to determine the question of conflict, but that it was its constitutional duty so to do, notwithstanding the increase of work that would be imposed. I found, however, that there were different views existing among the members. There were those who denied that the right existed. There was at least one, whom I have mentioned, who in innermost thought was opposed to the old rule, as indicated by the dissent from which I have quoted, and there were others who opposed a change of the then existing rule, without assigning further reason than its long existence. But smouldering fires need but a slight gust of wind to produce the flame. *Curtis*¹³ case was the gust of wind.

Curtis had sued Sexton in the Jackson County Circuit Court, and being forced to a nonsuit, *nisi*, he appealed to the Supreme Court¹⁴. Judge Valliant wrote the opinion and ruled that Curtis had adduced sufficient evidence to take his case to the jury, and reversed and remanded the cause. Upon a retrial Curtis obtained a judgment but in the meantime the jurisdictional amounts

12. (1916) 264 Mo. 1. c. 671, 188 S. W. 101.

13. *State ex rel. Curtis v. Broaddus* (1911) 238 Mo. 189, 142 S. W. 340.

14. *Curtis v. Sexton* (1907) 201 Mo. 217, 100 S. W. 17.

had been changed, and the next appeal went to the proper court of appeals. Although the evidence was substantially the same, that court reversed the case on the ground that a demurrer to the evidence should have been given, and also refused to certify to the Supreme Court, although asked so to do upon the ground that their ruling conflicted with the ruling of the Supreme Court. This was the straw which broke the camel's back.

Council in later cases undertook to argue that we meant, by the ruling in *State ex rel. v. Broadus*¹⁵, to say that the Supreme Court would only issue its writ of certiorari to courts of appeals in cases where the Supreme Court had once heard the particular case. These arguments fell upon deaf ears, and the rule was adhered to just as we have it now.

There is an able, exhaustive, and instructive *resume* of all the Supreme Court cases from the above case up to August, 1916, in 13 Law Series, Missouri Bulletin, pages 30 to 75 inclusive. Its author is the Hon. J. P. McBaine, now Dean of the Law Department of the Missouri State University. One will read this article with much pleasure and profit.

III.

REASONS FOR THE PRESENT RULE

Having been a part and parcel of the majority in the Supreme Court which first established the present rule as to certiorari to the courts of appeals, I hope to be able to assign to you satisfactory reasons for this present day rule. As stated, I shall be brief upon this point, because I have pointed to the case where I have fully discussed the reasons—not as ably as it might have been, but with such power as I possessed. My time, then, as it has been in the preparation of these notes, was limited. But to the reasons for the present rule. By the original constitution of 1875, sec. 3 art. VI, the Supreme Court was given the power and right of “a general superintending control over all inferior courts”. By the same section the Supreme Court was

15. (1911) 238 Mo. 189, 142 S. W. 340.

granted the power "to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial writs, and to hear and determine the same." By section 12 of art. VI of this original constitution the St. Louis Court of Appeals was created, but it should be noted that there was no provision *requiring* that court to follow the last controlling opinion of the Supreme Court. This is no doubt accounted for, in part, by the fact that in the more important cases to be disposed of by that court an appeal or writ of error would lie to the Supreme Court. But in 1884, when by amendment to the constitution, a system of courts of appeals was provided for, the framers of the amendment had looked into the future and bethought themselves of what might happen. By this amendment the field of action of the St. Louis Court of Appeals was broadened, the Kansas City Court of Appeals created, and provision made for the establishment of a third court of the same class¹⁶. Section 6 of the amendment of 1884, provides:

"When any one of said courts of appeals shall in any cause or proceeding render a decision which any one of the judges therein sitting shall deem contrary to any previous decision of any one of said courts of appeals, or of the Supreme Court, the said Court of Appeals must, of its own motion, pending the same term and not afterward, certify and transfer said cause or proceeding and the original transcript therein to the Supreme Court, and thereupon the Supreme Court must rehear and determine said cause or proceeding, as in case of jurisdiction obtained by ordinary appellate process; and the last previous rulings of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals."

Then, for fear that the original constitution had not made the right and power of the Supreme Court clear this amendment of 1884, by section 8 thereof provided: "The Supreme Court shall have superintending control over the courts of appeals by mandamus, prohibition and *certiorari*."

16. Secs. 1, 2 and 3 of the amendment of 1884.

By referring to section 6, it will be seen that the last clause thereof reads: "and the last previous rulings of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals." It was those provisions that Judge Gantt had before him in *State ex rel. v. Smith*¹⁷, when he said: "It seems clear that the legislature when it submitted this amendment, and the people when they adopted it, intended and designed that every citizen and litigant should have the equal protection of the law within this state, and there should be uniformity in the administration of justice. Had it been understood that one tribunal in the eastern portion of the state could declare the law one way and another tribunal in the western portion another way, and that no provision was made to prevent such a result, in our opinion the amendment would have been defeated. But the sixth section commended it to the bar and the people alike, because by it it was thought a simple mode was provided to insure uniformity in the decision of all the courts." He meant by "all the courts" not only the courts of appeals, but the Supreme Court as well, for he closes the paragraph with these enlightening words: "and to provide against over-sight or error this court (the Supreme Court) was made the final arbiter, with power of superintendence over all inferior courts, and courts of appeal especially, with power to issue writs of *mandamus*, prohibition, and *certiorari*."

The idea is that by the amended constitution we were adopting a system of appellate courts, with the Supreme Court at the head thereof, and with a superintending control of those courts by the Supreme Court. Throughout the whole thread of this amended constitution runs the thought of uniformity in the case law of the state as announced by the several appellate courts. The courts of appeals were to be guided in their opinions by the last previous rulings of the Supreme Court. This was provided because there could be no harmony in the base law without it. To reach this end two methods were provided: (1) a judge of the court of appeals could say that the majority opinion of that

17. (1891) 107 Mo. 1. c. 533, 16 S. W. 401.

court conflicted with certain opinions of the Supreme Court, or of another court of appeals, and ask that cause be certified to the Supreme Court for final determination; or, (2) in the event, using the language of Judge Gantt, by "oversight or error" the courts of appeals failed to follow the last rulings of the Supreme Court, then by *certiorari* that court could correct the conflict, and preserve the harmony of the law. Judge Gantt uses the term, "oversight or error" but may we be permitted to suppose a flagrant case? Suppose a court of appeals passed upon a case, otherwise within its jurisdiction, and openly said that their opinion did not accord with the last rulings of the Supreme Court, but failed to certify such case to the Supreme Court, what would become of harmony in the case law, if the Supreme Court could not bring before it, by *certiorari*, the record in that case, and upon a hearing quash such record?

Judge Bond, with great diligence, has collected all the cases supporting the old rule in his dissenting opinion in *State ex rel. v. Robertson*¹⁸. Those cases will be searched in vain for any serious discussion of that portion of section 6 of the amendment of 1884, which reads: "And the last previous rulings of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals." Those cases proceed upon the erroneous theory, that simply because the particular case fell within the appellate jurisdiction of a court of appeals, such court could in the face of the last quoted clause of the constitution, decide the case by announcing rulings of law or equity contrary to the last previous rulings of the Supreme Court upon the same questions. In other words those cases gave no effect whatever to the last clause of section 6 of the amendment of 1884. According to those cases there was left to the courts of appeals alone the power of determining whether or not there was conflict of opinion between them and the Supreme Court. As a practicing lawyer the rule of those cases grated upon my better judgment, and I never could bring to my

18. (1916) 264 Mo. 1. c. 681-2, 188 S. W. 101.

legal conscience an acquiescence in the law announced in those cases.

It was a useless act for the framers of the amendment of 1884 to make the last previous rulings of the Supreme Court controlling upon the courts of appeals, if other portions of the instrument did not give to the Supreme Court power to enforce this constitutional provision as against the courts of appeals. Our view is that this power was specifically granted by section 8 of the amendment of 1884, wherein it is said: "The Supreme Court shall have superintending control over the courts of appeals by *mandamus*, prohibition and *certiorari*." In other words, if such a court refuses to hear and determine a case which it should hear and determine, the Supreme Court by *mandamus* can compel it to act. If such court assumes jurisdiction and threatens to determine a case contrary to the constitution and law, the Supreme Court can prohibit such threatened action. And, if such court has determined a case in violation of the constitution and law, the Supreme Court by its writ of *certiorari* can bring before it the record and upon a hearing quash such record.

In what I have just written I have had in view the purpose of the writ of *certiorari* as announced by the authorities, i. e. "The purpose of the writ is to have the entire record of the inferior tribunal brought before the Supreme Court, to determine whether the former had jurisdiction or had exceeded its jurisdiction or *had failed to proceed according to the essential requirements of the law*." I must add that the constitution is a vital part of the law.

Both the old rule and the present rule of the Supreme Court are in accord on the question that the record and judgment of a court of appeals, upon *certiorari*, can be quashed by the Supreme Court, if the court of appeals was without jurisdiction in the first instance. The difference between the two rules lies within the latter portion of the quotation given in the preceding paragraph. The present rule proceeds upon the theory that a court of appeals may have jurisdiction in the first instance, but in the

course of its proceedings it may violate the constitution, and thereby act in excess of its lawful jurisdiction. Such is the case when such a court, in deciding a case, otherwise within its lawful power, acts beyond its jurisdiction when it either fails or refuses to recognize the last previous ruling of the Supreme Court as controlling. The constitution says that such last previous ruling of the Supreme Court shall be controlling, and when a court of appeals violates this provision, it gets beyond its lawful jurisdiction and authority in the particular case.

To be plain, the constitution has fixed an orbit in which these courts must travel in the disposition of the cases properly before them. Following the last previous ruling of the Supreme Court is a constitutional provision which must be obeyed, if the courts of appeals would travel in the orbit fixed for them by the amendment of 1884. They are acting in excess of their lawful powers when they ignore this provision of the constitution, and their record should be quashed upon certiorari. In conclusion it will suffice to say that the Supreme Court has the constitutional power to determine an alleged conflict of opinions, and to quash the opinion of a court of appeals, if such opinion conflicts with previous rulings of the Supreme Court. Harmony in the case law cannot otherwise be attained.

IV.

THE PRACTICE

To the beginner in the law, the practice is a thing of first importance. The Supreme Court has clearly indicated to the bar that the granting of the writ of certiorari is purely discretionary¹⁹. It was such at the common law and our rule comports with that of the common law.

Limiting our discussion to the writ of certiorari as used by the Supreme Court against the courts of appeals in the interest of uniformity of the law, it must be said that the practice is gov-

19. *State ex rel. Gardner v. Hall* (1920) 282 Mo. 425, 221 S. W. 708; *State ex rel. v. Ellison* (1921) 230 S. W. 970.

erned, (1) by the rules of the Supreme Court, and (2) by the case-made law since the case of *State ex rel. v. Broaddus*²⁰.

The applicable rules are Nos. 32, 33 and 34 of the present revised rules of the Supreme Court, which rules are printed at the end of each volume of the reports. The first two rules (32 and 33) have but general application. Thus rule 32 provides that no remedial writ will be granted when the party has adequate relief by appeal or writ of error. By rule 33 it is indicated that oral arguments will not be heard on applications for remedial writs, and this applies to applications or petitions for the writ of certiorari. This rule also provides that if a remedial writ is granted, then upon final hearing "printed abstracts and briefs shall be filed in all respects as is required in appeals and writs of error in ordinary cases". This rule should be noted, because lawyers of long experience have, a few times, overlooked the fact that a printed abstract was required in a certain case. This rule applies to certiorari and must be observed.

Rule 34 is one which applies specifically to applications for the writ of certiorari, which we have under discussion. The rule requires, (1) a notice of five days to the opposite party, or parties adversely affected, (2) that the petition or application shall not exceed five pages, in which counsel shall "concisely set out the issue presented to the court of appeals and show wherein and in what manner the alleged conflicting ruling arose, and shall designate the precise place in our official reports where the controlling decision will be found "and (3) such petition shall be accompanied by, (a) copy of the court of appeal's opinion complained of in the petition, (b) copy of motion for rehearing, or to transfer to the Supreme Court, with copy of the rulings upon such motion or motions by the court of appeals, (c) suggestions in support of the petition or application, which shall not exceed six typewritten or printed pages. The notice which the rule requires to be given to the party adversely interested must be accompanied by a true copy of the petition and all the exhibits and suggestions. The adverse party may file suggestions in op-

20. (1911) 238 Mo. 189, 142 S. W. 340.

position to the granting of the writ at any time prior to the date fixed by the notice as the time for the presentation of the application or petition for the writ. These suggestions must be limited to five pages. The purpose of this rule is obvious. If there is a real conflict of opinion, it does not require a volume of matter to state it. Some lawyers imagine, or seem to imagine, that verbosity is an evidence of erudition, but quite the contrary is true. The real legal mind is full of thought and substance with the power to express it in precise and brief terms.

One suggestion may not be out of the way here. An application for the writ should concisely show the issues, *nisi*, and the issues in the court of appeals. Further, it should be shown in the fewest apt words the ruling or rulings of that court which conflict with those of the Supreme Court, pointing to the case or cases by book and page. One should not endeavor to find a great number of conflicts, but find the real conflicts, if such there be. Too many lawyers proceed upon the drag-net theory. If one has a case of real conflict he should state it and quit. It requires the time of the court to winnow the grain from the chaff in these drag-net applications. A lawyer should not drift into the habit of preparing such applications. Nor should he be disappointed if the court is unable to discern conflict even in what he considers a real conflict. Great minds often differ. It is safe to say that there is about one application granted to where there are seven to nine refused.

Another matter of interest is that if the court has in mind a case decided by the Supreme Court, which does in fact conflict with that of the court of appeals, the court will make use of its own knowledge, and in the disposition of the certiorari case, will use the case of which it has knowledge, although not called to the court's attention in the briefs. This is done on the theory that real harmony of the law is the chief purpose of the writ now under consideration.

The practice of the Supreme Court under its rules and the law is to be found in cases since the *Curtis* case. The rules of court indicate no limit of time within which petitions or appli-

cations for the writ may be filed. There is no statute upon the subject in Missouri. So, a rule of law had to be established upon that question. This was to have been expected in the earlier cases, but it did not come forth, because the question was not raised by counsel until the recent case of *State ex rel. Berkshire v. Ellison*²¹. In that case the writ of certiorari was quashed because of laches. In other words, the court ruled that the application upon which the writ was issued was not timely made. The further ruling was that a period of thirty days from the time the motion for rehearing was overruled by the court of appeals, was, to say the least, a reasonable time within which to make application for the writ, and that due diligence would require notice of an intended application even earlier. The reasons for this rule may be gathered from the opinion in *Berkshire's* case.

The most important question in the matter of practice (and not mentioned in the rules of court) is just what will be considered by the court in the final disposition of the case. There were, and are now, members of the court entertaining the view that we should consider the whole record before the court of appeals, including the evidence preserved in the bill of exceptions. This view has some sustaining authority in the common law practice. The court has finally settled the matter by holding that it will look solely to the opinion of the court of appeals for the evidentiary facts, indulging the presumption that such court has stated the facts in its opinion²². It was not long before division arose as to whether a written document if mentioned in the opinion could be considered as a part of the opinion of the court of appeals. Prior to *Wahl's* case it had been ruled that such documents would be considered²³. The peculiar language of *Wahl's* case became a disturbing factor. The lamented

21. (1921) 230 S. W. 970.

22. *State ex rel. Wahl v. Reynolds* (1917) 272 Mo. 588, 199 S. W. 978.

23. *State ex rel. v. Ellison* (1915) 176 S. W. 1. c. 12; *State ex rel. v. Robertson* (1916) 264 Mo. 661, 188 S. W. 1. c. 102; *State ex rel. v. Ellison* (1916) 191 S. W. 1. c. 53.

Judge Bond, with an eye singly directed to the curbing of the power of the Supreme Court in these certiorari cases, used this language: "Nor does it (the court's rule of review) embrace any consideration of the record of the case in the court of appeals further than the same is *set forth* in the opinion under review." "Set forth" in the record might have a very restricted meaning, and I have no doubt (knowing as I do the views of Judge Bond) that he used the words in the most restrictive sense. He meant, (leaving out of consideration what construction those who agreed with him gave to the words) that if the opinion mentioned an instruction, but did not set it out in the opinion in substance or in *haec verba*, the Supreme Court could not look at that instruction. These unfortunate words "set forth" occasioned another review of the cases in *State ex rel. Kansas City v. Ellison*²⁴. There the applicable case law was collated, and the rule was finally announced that the Supreme Court would take the facts from the court of appeals opinion for the evidentiary facts of the case, but would also examine any written document mentioned in the opinion, although not "set forth" in the opinion. This is for the sound reason that the mention of such written instruments (which includes instructions) made such written instruments just as much a part of the opinion, as if they were fully written out therein. This is a sensible rule, and it works toward the ends of exact justice. A court of appeals cannot well write an opinion without making some reference to the pleadings and the several contested instructions. Under the present rule the real question of conflict can be determined with certainty.

Finally, upon the determination of the case upon certiorari, the Supreme Court either quashes the record of the court of appeals, or quashes its own writ. The latter action leaves the action of the court of appeals undisturbed. If the record of the court of appeals is quashed, the original case is left pending there as if it had never been determined, but in the future deter-

24. (1920) 220 S. W. 498.

mination of the cause, such court would be bound by the opinion of the Supreme Court in the certiorari proceedings. The Supreme Court renders no judgment in the particular case, which has been the occasion of the certiorari proceeding.

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LAW SERIES

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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—Mr. Justice Holmes, *Collected Legal Essays*, p. 269.

NOTES ON RECENT MISSOURI CASES

CONTRACTS—OFFER OF REWARD FOR INFORMATION LEADING TO CONVICTION OF AN OFFENDER—RIGHT TO REWARD ON DEATH OF CONVICTED PARTY AFTER ENTRY OF JUDGMENT OF CONVICTION AND APPEAL THEREFROM BUT BEFORE A HEARING ON THE APPEAL. *Scott v. American Express Company*.¹ Defendant offered a reward for first information leading to the arrest and conviction of the person who robbed a certain express messenger. Plaintiff gave information which led to the arrest and conviction of one Buntyn in Tennessee. Buntyn, on conviction, appealed and while his appeal was pending but before it was heard died. Under this state of facts, plaintiff claimed that he had earned the reward and brought an action in Missouri to recover the same. Plaintiff had judgment in the lower court, but the Springfield Court of Appeals reversed it, holding that plaintiff could not recover because "conviction" meant final conviction, and also because defendant's purpose in making the offer was to secure Buntyn's punishment. It was stated that in as much as there had been neither a final conviction, nor an attainment of defendant's end, plaintiff was not entitled to the reward.²

1. (1921) 233 S. W. 492.

2. (1921) 233 S. W. 1. c. 493.

The decisions of all courts seem to agree that an advertisement, offering a reward for the conviction of a criminal offender, is an offer, which looks to the formation of an unilateral contract, i. e. the advertiser contemplates as the acceptance of his offer, an act or a series of acts. If the expected act or acts are performed by any one with the intention of accepting the offer, a contract results, and the offerer will be bound to pay the reward.³ But every offer, to ripen into a contract, must be accepted according to its terms, and therefore the difficult question in this type of case is to ascertain what is meant by "conviction". If what is done by the claimant of the reward has not led to a conviction in the intended sense of that word, there is no contract because the acts contemplated by the offerer have not been accomplished and there has been no acceptance of the offer within its meaning. Obviously the decision in the instant case is correct if "conviction" as stipulated for in the offer meant legal conviction, as there was no such occurrence until final judgment was entered, and the death of the convicted party pending the appeal abated "the prosecution and cause of action" entirely.⁴ Is it proper then to hold with the court that "conviction" has this technical meaning in offers of this kind?

An accurate answer to the above question will depend on ascertaining what the ordinary offerer of a reward for a conviction reasonably expects to get by way of performance from the party who attempts to accept his offer. An offerer is not entitled to attribute an unusual meaning to his offer, or to say that it carried a meaning different from what it appeared to mean to a reasonably intelligent man. If an offerer has done that which the offer, reasonably interpreted, appeared to call for as an acceptance, the offerer will be bound, and there will be a contract even though the offerer desired the offer to demand something other than that which was performed, and did not wish to be bound contractually under the actually existing conditions. In determining whether or not there has been an acceptance of an offer, the question invariably is, what was the offerer's *objective* intent? The courts are not concerned with the latter's *subjective* intentions and expectations. What did the offerer, as reasonably understood, appear to ask for as an acceptance is the test, and if the offeree has accepted according to such a construction of the offer there is a contract.⁵

3. *Lovejoy v. Atchison, etc., R. R.* (1893) 53 Mo. App. 386; *Freeman v. City of Boston* (1842) 46 Mass. 56; *Furman v. Pike* (1848) 21 N. J. L. 310. See also *Harrard v. Dickerson* (1914) 180 Mo. App. 70, 165 S. W. 1135 (offer of reward for capture); *Cummings v. Clinton Co.* (1903) 181 Mo. 162, 79 S. W. 1127 (offer of a reward for arrest);

Smith v. Vernon Co. (1905) 188 Mo. 501, 87 S. W. 942 (offer of reward for arrest).

4. (1921) 233 S. W. 1. c. 493. See accord *State v. Perrine* (1874) 56 Mo. 602; *Carrolton v. Rhomberg* (1883) 78 Mo. 547. See *U. S. v. Pomerooy* (1907) 152 Fed. 279.

5. Williston, *Contracts*, sec. 21.

In the ordinary case, when an offer is made for information leading to the conviction of a person, the normal purpose attributable to the offerer will be that of having the proper court take jurisdiction of the offender and finally enforcing the judgment after guilt has been established in the manner provided by law. If the offeree supplies the evidence requisite to secure such court action, and the proper officials procure the action, the offer has been accepted and the reward has been earned.⁶ The offer cannot contemplate personal action by the offeree beyond this point and his own personal testimony if called for. Manifestly, it could not require any action on the part of the offeree other than this, as this is the only possible participation in the conviction that the latter could have. But in the usual case there must be this kind of court action, and until it is finally taken, there can be no contract with respect to the reward. So, it has been held that if the offender commits suicide before the trial there has been no acceptance of the offer, even though the information tendered by the offeree would have been sufficient for a conviction, if the offender had only lived and been placed on trial.⁷ Such a decision is correct. It should make no difference that the cause of failure to convict was due to some matter beyond the control of the offeree. The offer was conditional and the offerer agreed to be bound only if the condition was complied with. Again, and for the same reason, it has been ruled that a plaintiff cannot recover the reward where there has been a conviction in the lower court, followed by an appeal still pending.⁸ The rule, then, usually is that the reward has not been earned until the offender has been brought to justice and his case duly and finally disposed of on the basis of his established guilt.

It was said in the decision under review that the purpose of the offerer in making an offer of this kind is to procure the punishment of the criminal, and, therefore, unless punishment follows that the reward could not be claimed.⁹ But this statement, taken alone, is too broad, and there are cases where the reward will be recoverable, even though the offender may not have been punished. Suppose that conviction follows

6. *Re Kelly* (1872) 39 Conn. 159; *Elkins v. Commissioners* (1898) 86 Kan. 305, 120 Pac. 542; *Crawshaw v. Roxbury* (1856) 7 Gray (Mass.) 374; *Porterfield v. State* (1893) 92 Tenn. 289, 21 S. W. 519; *Tobin v. McComb* (1913) 156 S. W. (Tex.) 237. Some courts are disposed to be still more liberal. Thus in *Rogers v. McRoach* (N. Y. Sup. Court.) (1909) 120 N. Y. Supp. 686, it was held that the plaintiff was entitled to a reward. He had furnished only a clue to the police who, acting thereon, arrested

the criminal and caused his conviction. But see *Lovejoy v. Atchison etc. R. R.*, *supra*, note 3.

7. *Fortier v. Wilson* (1883) 11 U. C. C. P. 495.

8. *Stone v. Wickliffe* (1899) 106 Ky. 252, 50 S. W. 44. See *Cornwell v. St. Louis etc. Co.* (1903) 100 Mo. App. 258, 73 S. W. 305.

9. (1921) 233 S. W. 1, c. 493. This is the general rule. See also *Fortier v. Wilson*, *supra*, note 7; *Re Kelly*, *supra*, note 6.

the offeree's action, but that sentence is suspended, or even commuted, or that the convicted party is pardoned. It would not be accurate in a case of this kind to hold that the offer had not been accepted. As a matter of fact it has been, because the offender had been "brought to justice" and the case had been finally disposed of on the basis of the latter's guilt. Indeed it would be correct to say that in every case where there has been a technical conviction, which has been followed by any possible legal result, which has not upset or invalidated the conviction, the reward should be regarded as due. In every such case there has been compliance with the terms of the offer, and if punishment of the offender has not ensued, this was not because there had not been a conviction, but because the law did not provide for punishment.¹⁰

In certain cases, at first blush, it may appear as if the plaintiff ought to be entitled to the reward even though there has not been a conviction. Such a holding may appeal to us as being proper in a case where a plaintiff has acquired all apparently essential evidence for a conviction, but, due to no fault of his own, no trial is had. Suppose that the offender dies before the trial or suppose that the state officials refuse to prosecute; in such cases our compassion is with the plaintiff and it might lead us to hold that he should recover the reward. This would seem especially to be the case where the alleged criminal dies before his trial. The principal case is analogous to those supposed. It is doubted, however, if there is any legal basis for deciding that the reward has been earned and it is believed that the holding in the case under review is sound. It is not perceived how a plaintiff can assert with any degree of success that the offer meant evidence which probably would have secured a conviction or have brought the offender to justice had final court action occurred. The offerer was interested not in possibilities but in the actual meting out of justice according to law to the man who committed the crime, which called forth the reward. If there was no conviction the purpose of the offerer was not accomplished; and if the offender died and conviction was no longer possible then there was no longer any purpose in the mind of the offerer to be subserved. This is the only reasonable interpretation which can be placed on such an offer, and for this reason there is no justification for a plaintiff claiming the reward under these conditions.

10. *Williams v. U. S.* (1868) 12 U. S. Court of Claims 192 (suspended sentence); *Wilmore v. Hensel* (1892) 25 Atl. (Pa.) 86. See also *Louisville etc. R. R. v. Goodnight*, *infra*, note 11. A peculiar case is *Buckley v. Schwartz* (1892) 83 Wis. 305, 53 N. W. 511. It

was there held that plaintiff had accepted an offer to pay a reward for securing a conviction before a jury by obtaining a verdict of guilty even though an order in arrest of judgment was entered. The court held that the order did not set aside the verdict in a criminal case.

*Louisville & Nashville R. R. Co. v. Goodnight*¹¹ deserves separate consideration because of the peculiar situation there presented. Plaintiff in error offered a reward for the capture and conviction of each of the persons who aided in derailing one of its trains. Defendants in error procured the arrest of two of the offenders, Cornwell and Evans, and upon their evidence they were duly indicted. They confessed their guilt in open court. The company's attorneys were also employed in the prosecution of the offenders and they, together with the prosecuting officials of the Commonwealth, deemed it advisable to procure the dismissal of the indictments against Cornwell and Evans in order that they might more feasibly turn state's evidence and aid in the apprehension and conviction of others who had been associated with them in the commission of the crime and who were regarded by the prosecution as being more flagrant violators of the law. In pursuance of this scheme, the indictment was dismissed and Evans and Cornwell were set free. The defendants in error, nevertheless, claimed the reward. It was conceded that the freed persons were guilty, and in all probability could have been convicted upon their confessions and other evidence that defendants in error had procured. Plaintiff in error denied its obligation on the ground that there had been no conviction within the meaning of the offer. The court decided, however, for defendants in error on the extremely narrow ground that the company through its own attorneys in causing the dismissal of the indictments against Cornwell and Evans had itself prevented the performance of the contract by defendants in error and could not for this reason escape its liability. In this connection, the court said: " * * if the happening of the event upon which their right to the reward depended was hindered or prevented by the act of the company, such hindrance was in law equivalent to the completion of the condition precedent, and the railroad company is liable on its contract to pay the reward, although it may have acted in the matter in the utmost good faith."¹² Perhaps such prevention ought to have been regarded as the equivalent of performance by defendants in error, or a waiver of such performance if caused by the company. It is conceivable, however, that the act of assisting in obtaining a conviction was not only a *condition* to claiming the reward but also a *part* of the acceptance of the offer. If this were the case there is reputable authority to the effect that the company's act of hindrance, if known to the offerees, would amount to a revocation of the offer and would thus prevent its being accepted in the future.¹³ Moreover, it seems doubtful to the writer whether the company's attor-

11. (1874) 10 Bush (Ky.) 552, 19 Am. R. 80.

12. (1874) 10 Bush 1. c. 554.

13. *Biggers v. Owen* (1887) 79 Ga. 658, 53 S. W. 193; Langdell, Summary

of Contracts sec. 4; Williston, Contracts, sec. 60. It has, however, been contended that in a case of an offer looking to the formation of a unilateral contract that the offerer ought not to be free to

neys could be regarded as acting for plaintiff in error while they were engaged in assisting in the prosecution of the offenders. They were engaged in a public duty, which they had voluntarily assumed, and they were obliged, by the very assumption, to further the state's interest to the exclusion of the company's. It would seem, therefore, that the basis of the decision may not be tenable either (1) because the company did not prevent the performance of a condition, or (2) because even conceding that plaintiff in error did prevent the conviction, participation in the conviction was not only a condition, but was also an act constituting acceptance of the offer, and preventing such act was in fact a revocation of the offer.

Conceding, however, both of the foregoing suggestions to be sound, the decision may still be justified and sustained, if it is possible to say that that which defendants in error did, even though it did not result in conviction, was what plaintiff in error reasonably appeared to desire as an acceptance of its offer. If a proper interpretation of the offer would lead a person to believe that the company was willing to pay for what was actually done as being the equivalent of a conviction it will surely follow that defendants in error earned the reward. In order to reach such a conclusion it will have to be said that the offerer expressed a willingness to pay for any disposition of the case by the state which might be predicate on the alleged offenders' practically certain guilt. If the offerer merely wanted the offeree to take such steps as to cause governmental action based on practically certain guilt, then the defendants in error did accept the offer. It would seem, though, that such an inter-

withdraw the offer if the offeree attempts to accept the same until a reasonable time for the performance of the required act has expired. It is said that there is a collateral obligation to hold the offer open under these conditions. See article by Professor McGovney 27 Harv. Law Rev. 644 and also articles by Professor Corbin, 26 Yale Law Journal 1. c. 194 *et seq.*, and by Professor Ballantine 5 Minn. L. R. 94. In *Elkins v. Commissioners* (1912) 120 Pac. (Kan.) 1. c. 543 it was said in speaking of an offer of a reward: "It is not questioned, that upon any person seeing the published offer of reward and entering upon an attempt to gain it, there arose a contract between him and the Board of County Commissioners conditioned that if he effected 'the arrest and conviction' of the murderer, the county would pay

him \$300." The court evidently believed that the entry upon performance by an offeree bound the offerer to give the offeree an opportunity to earn the reward by bringing about the arrest and conviction of the offender. The quoted statement was not necessary to the actual decision.

See also *Smith v. State* (1916) 151 Pac. (Nev.) 512, holding that where the offer is for arrest and conviction a plaintiff may recover the reward, if he in arresting the alleged criminal kills him. The court stated that the killing was justifiable and that the death of the offender excused plaintiff from procuring his conviction. It was also said that there had been a substantial compliance with the condition of the reward. The reward was offered pursuant to statutory provision.

pretation of the offer is highly speculative and for this reason unwarranted. It must not be forgotten that an offeror is free to dictate his own terms and that an offeree assumes the risk of not meeting the same. While it is true that "conviction" as used in this type of offer must be liberally construed, still to say that the word means something short of final conviction, or adjudication of guilt of the offender is to attribute to it a distorted and unreasonable meaning.¹⁴

J. L. PARKS

CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.
*State v. Johnson.*¹ The trial court gave the following instruction: "If the whole evidence in this case leaves the minds of the jury in such a condition that they are neither morally certain of the defendant's innocence, nor morally certain of his guilt, then a reasonable doubt exists, and the jury must give the defendant the benefit of such doubt and acquit him." The Supreme Court of Missouri condemned this instruction as "radically and incurably wrong". The reason given was: "The theory is that, unless the jurors are morally certain of the defendant's innocence, they cannot acquit on the ground of reasonable doubt. Such a doubt exists if, from a consideration of all the evidence they are not morally certain of the defendant's guilt."²

It is submitted that the words used by the trial judge do not justify the interpretation given to them. He told the jury that if they were certain of the defendant's guilt but still were not certain of his innocence—in other words, if their minds were in a state of complete indecision—they must acquit. The trial court apparently recognized that the jury might conceivably find themselves in one of three states of mind: (a) morally certain of the innocence of the accused; (b) morally certain of his guilt; or (c) a state of mind between these two extremes. He merely called attention to their duty if they found themselves in a state of uncertainty. It is in cases where this frame of mind exists and in such cases only that an instruction on reasonable doubt can legitimately have a decisive effect.

No clear statement of the present common law rule that proof in criminal cases must be "beyond a reasonable doubt" seems to have been formulated until the latter half of the eighteenth century. The term

14. The writer has been assisted in finding the authorities by George E. Woodruff, student in the School of Law.

1. (1921) 234 S. W. 794.

2. (1921) 234 S. W. 1. c. 796.

seems to have been judicially used first in *Rex v. Donnelly*.³ The rule there announced was adopted in this country at an early date.⁴

In criminal as well as in civil cases the duty of adducing evidence which will avail to convince the tryer of the fact is upon the burden-bearer.⁵ As long as the jurors are in a state of uncertainty the burden-bearer has not met that duty and the verdict must be for his opponent. An English Lord Chancellor put the matter thus in *Winans v. Attorney General*:⁶ "I cannot say that I can come to a satisfactory conclusion either way; but then the law relieves me from the embarrassment which would otherwise condemn me to the solution of an insoluble problem, because it directs me in my present state of mind to consider upon whom is the burden of proof." It would appear, then, to be correct to instruct a jury that if they are in a state of uncertainty about the case they must find for the defendant.

Dicta and decisions have approved this rule. At a time when the rule of reasonable doubt was being first formulated, Smith, B., told an Irish jury in *Rex v. Flemming*⁷ that: "If they had a doubt on the point whether the witness had committed perjury or not, if their minds were in a state of *oscillation*, they ought to acquit." (Italics supplied.) Chief Justice Shaw in *Commonwealth v. Webster*⁸ used similar language: "- - - what is a reasonable doubt? - - - It is that doubt which, after the entire consideration of all the evidence has been taken, leaves the jury uncertain." An instruction embodying the same idea was approved in *Simmons v. State*⁹ by the Supreme Court of Alabama.

Any attempted definition of the expression "reasonable doubt" is likely to confuse.¹⁰ In *State v. Robinson*¹¹ our court has said: "It is

3. (1803) 28 Howell State Trials, 1. c. 1095. For History of the Common Law rule see 10 Am. Law Rev. 642, 1. c. 656. See also *Rex v. Flemming*, *infra*, note 7.

4. See e. g. Patterson, J., to the jury in *U. S. v. Lyon* (1798) 6 American State Trials 687 1. c. 694. "You must be satisfied beyond all reasonable and substantial doubt."

5. Wigmore, Evidence, sec. 2497-2498.

6. (1904) A. C. 287 1. c. 289, Hinton's Cases on Evidence, 1. c. 36.

7. (1798) McNally, Evidence on Pleas of the Crown, p. 2.

8. 4 American State Trials 93 1. c. 415. The case is also reported in 5 Cush. 295 and 52 American Decisions 711. In the last reports of the case the words here quoted do not appear. The report

in American State Trials is the product of the ripest scholarship and would seem to be more authentic than the others.

9. (1909) 158 Ala. 8, 48 So. 606: "The doubt that justifies an acquittal must be reasonable doubt, such a doubt as leaves the mind of the jury, in view of all the evidence, in a state of reasonable uncertainty as to the guilt of the defendant."

10. *Hamilton v. People* (1874) 29 Mich. 173 1. c. 194; *Massey v. State* (1877) 1 Tex. App. 536 1. c. 570; *Bland v. State* (1878) 4 Tex. App. 15, 1. c. 17; *Abram v. State* (1896) 36 Tex. Crim. Rep. 44 (an extreme case); *McAlpine v. State* (1872) 47 Ala. 78; *People v. Huntington* (1903) 138 Cal. 261, 70 Pac. 234. Wigmore on Evidence, sec. 2497.

11. (1893) 117 Mo. 649, 23 S. W. 1066.

difficult to explain simple terms like 'reasonable doubt' so as to make them appear plainer. - - - Every attempt to explain them renders an explanation of the explanation necessary." In *State v. Bond*¹² the simple definition of reasonable doubt as a substantial doubt, approved many years before in *State v. Nueslein*,¹³ was declared to be sufficient, and further attempts at definition were condemned. Later the Supreme Court of Missouri held that: "It is not reversible error to give or refuse such a definition" i. e. one similar to one approved in *State v. Nueslein, supra*. The court also stated: "Such definition should not be used."¹⁴

The test suggested by the trial court in the case under review was that of moral certainty. The jury were told that if they were not morally certain of defendant's guilt they had a reasonable doubt and should acquit. The words, "moral certainty" have been held in other jurisdictions to be synonymous with reasonable doubt in a number of cases.¹⁵ But at least one well reasoned opinion states that the term is too favorable for a defendant.¹⁶

The court in the case under review cited no authority in support of its position and failed to note *State v. David*.¹⁷ There an instruction containing, in part, the same direction (though somewhat differently ex-

12. (1905) 191 Mo. 555, 90 S. W. 830.

13. (1857) 25 Mo. 111.

14. *State v. Sykes* (1912) 248 Mo. 708, 154 S. W. 1130.

15. *State v. Long* (1899) 72 Conn. 39, 43 Atl. 493; *Bone v. State* (1897) 102 Ga. 387, 30 S. E. 845; *People v. Chutuk* (1912) 18 Cal. App. 768, 124 Pac. 566; *Simmons v. State* (1909) 158 Ala. 8, 48 So. 606; *Bailey v. State* (1901) 133 Ala. 155, 32 So. 57.

16. *Territory v. Barth* (1887) 15 Pac. 673, 1. c. 676.

17. (1895) 141 Mo. 380, 33 S. W. 28. The instruction on reasonable doubt follows: "And if, upon a view of the whole case, you have a reasonable doubt of the guilt of the defendant, you will acquit him; but such a reasonable doubt as mentioned in these instructions, and which will authorize an acquittal on that ground, must be a substantial doubt of defendant's guilt, founded and based upon the evidence and all the facts and circumstances proven in the case, and not a mere possibility of innocence. If, however, the whole evidence in the case

leaves your minds in such condition that you are neither morally certain of the defendant's guilt nor morally certain of his innocence, then a reasonable doubt exists and in such case you should give the defendant the benefit of such doubt, and acquit him." For an unknown reason this instruction is omitted in the official state report, but the approval of the instruction is the same in both reports.

The court stated that the instruction was "entirely different from the instruction condemned in *State v. Shaeffer*, 89 Mo. 271, 1. S. W. 293."

In that case the discussion of the instruction was not necessary to the determination of the case and admitted not to be so. It is difficult to understand how the instruction there given could have been detrimental to the accused. After all is said is there any logical difference between a conviction "beyond a reasonable doubt" and a conviction "to a reasonable certainty"? No doubt the former expression sounds more serious and is calculated to make a jury more careful than the latter. See *Pelletier v. Chicago*,

pressed) was given. The conviction was affirmed and the instruction was expressly approved by Gantt, P. J.

Without expressing a decided opinion that a refusal to give the instruction under review would be a reversible error of which defendant could complain, nevertheless, it seems that there is no objection if the instruction is given.

B. E. JR.

EASEMENTS—ACQUISITION BY PRESCRIPTION—PRESUMPTION OF A LOST GRANT. *Kuhlman v. Stewart*.¹ The plaintiff sought a permanent injunction restraining defendant from damming up a drainage ditch which ran through portions of the farms of both. Plaintiff rested his claim to relief upon an alleged easement acquired by prescription. The evidence did not show user for the the requisite period nor adverse user and for these reasons the result reached by the court seems correct. The following passage, however, appears by way of *dictum*.

"So that in this case proof of 30 years continuous use (were there substantial proof of this character) *might* authorize the finding that there was a proper grant, but for the express and positive evidence that the whole thing rests upon a parol agreement between Caroline Kuhlman and Elmer Price, one of the Price heirs. *The proof of the express parol agreement destroys all presumption of a grant. In other words, the proof shows that this ditch had its origin in an oral agreement, rather than in a grant, and with this direct proof in the record, there is no room for the presumption of a grant, which is the foundation of the doctrine of prescription, in such cases. The oral agreement proven in this case shows a license rather than an easement.*" (Italics supplied.)"

This language seems to admit of the construction that the Supreme Court of Missouri believes that a prescriptive right depends ultimately upon the existence of a grant; that if it be shown as a fact that no

St. P., M. & O. Ry. Co. (1894) 88 Wis. 521, 60 N. W. 250.

State v. Schaeffer (1886) 89 Mo. 271, 1 S. W. 293, is approved in *State v. Jackson* (1888) 95 Mo. 623, 1. c. 658, 8 S. W. 749 and *State v. Pierce* (1912) 243 Mo. 524, 147 S. W. 970.

1. (1920) 221 S. W. 31.

2. Observe also this statement: "An easement can only be created by grant." 221 S. W. 1. c. 33.

3. Why does Graves, J., imply that thirty years user is necessary? The

analogy of section 1305 R. S. Mo. 1919, would suggest ten years as the proper length of time. Compare *Ellison, J.*, in *House v. Montgomery* (1885) 19 Mo. App. 1. c. 182: "Applying these principles to the case before us, we would say that the period requisite to acquire an easement in this state is ten years, in analogy to our present statute of limitations."

See also *State v. Walters* (1879) 69 Mo. 1. c. 465 and numerous cases cited in note 23, *infra*.

grant was ever made then there is no prescriptive right, no matter how long the user.

We are confronted with this proposition: is the presumption of a lost grant upon the showing of open, adverse, and uninterrupted user under claim of right *conclusive* and therefore not a presumption at all but a rule of substantive law; or is it a true presumption which is dissolved by producing evidence that no grant has in fact been made?

At common law title to land lay in seisin, but easements being mere rights in land lay only in grant. As stated by a learned English authority, "Easements, being rights which are superadded to the ordinary common law incidents of the ownership of real property, can only be created by grant or statute."⁴

But at a very early date the common law courts recognized the desirability, indeed the necessity, of giving effect to long continued exercise of such rights in land even though no grant in fact existed. From this policy of giving effect to user came the old common law doctrine of prescription. If it could be shown that the right claimed had been enjoyed continuously for a time before which "the memory of man runneth not to the contrary" the court would presume the enjoyment to be referable to a right which had a lawful origin, viz, a grant.⁵ And since it was impossible to produce evidence in refutation of this presumption it could not be questioned. Prescription, therefore, became at a very early date one means of creating an easement.

In 1275 the statute of 3 Edw. I, c. 29, provided that none should declare upon the seisin of his ancestor beyond the beginning of the reign of Richard I. (1189). Although this statute did not expressly include incorporeal hereditaments, the law courts adopted it, by way of analogy, as fixing the time of legal memory.⁶ From this time forward a showing of uninterrupted enjoyment of a right in land from 1189 conclusively established the existence of the right claimed.⁷ As time went on, it became a practical impossibility to make use of prescription in establishing the right because as the year 1189 receded the possibility of producing evidence of uninterrupted enjoyment from that date became more and more remote. In 1540 Parliament passed the second statute of limita-

4. Lord Halsbury, Laws of England, Vol. XI, page 243.

5. Lord Halsbury, Laws of England, Vol. XI, page 258; Gale, Easements, 8th Ed., pages 192, 193, 9th Ed., 188.

6. Gale, Easements, 8th Ed., page 188, 9th Ed., page 183, and authorities there cited. See in general: *Wallace v. Fletcher* (1855) 30 N. H. 1. c. 445; *Tracy v. Atherton* (1864) 36 Vt. 503;

Strickler v. Todd (1823) 10 Serg. & Rawle (Pa.) 1. c. 68; *Coolidge v. Learned* (1829) 8 Pick. (Mass.) 504, and authorities there cited; *House v. Montgomery* (1885) 19 Mo. App. 170; *Anthony v. Building Co.* (1905) 188 Mo. 1. c. 719, 87 S. W. 921.

7. Gale, Easements, 8th Ed. page 188, and authorities there cited.

tions⁸ shortening the period within which actions for the recovery of land could be maintained to sixty years. However, the common law courts declined to follow the precedent long established under the statute of 3 Edw. I,⁹ and continued to require proof of enjoyment from 1189 to raise a right by prescription.¹⁰ The hardship and injustice of this rule subsequently led to the introduction of a fiction. At first, it appears that a showing of user since the memory of "living man" was held to raise a presumption that the user had existed since legal memory i. e. 1189. This presumption, however, could be rendered useless by evidence of non-existence of the right claimed at any time during the period since 1189.¹¹ Later, the fiction of a modern lost grant was introduced. If it could be established that the right claimed had been enjoyed for

8. (1540) 32 Hen. 8.

9. The reason for this is not apparent from any of the authorities examined. In *Wallace v. Fletcher* (1855) 30 N. H. 1. c. 445, the learned Judge wrote: "In 1275, by statute 3 Edw. 1, writs of right were limited to rights actually enjoyed after the first year of Richard 1, (1189) and by analogy to the period fixed by that statute, it was held that time of legal memory reached to that date, and not beyond it. Being a fixed date, it was of course continually receding, until it became absurd, since it was practically impossible to prove any fact of so ancient a date.

"The courts might have held, when difficulties were found to result from this arbitrary rule, that the ancient law, which fixed the period beyond which actual memory did not reach, was still in force, or they might have availed themselves of the passage of the statute of 32 Henry VIII, which reduced the limitation of writs of right to three score years, to decide by analogy to that statute, as was done in the time of Edward I, that the time of legal memory was reduced to sixty years. It appears by Littleton, 170, that in his time it was seriously contended that the time of legal memory was not changed by the Statute of Edward I. And Rolle, C. J., was of that opinion, though he admits the practice was otherwise. 2 Rolle's Ab. Prescription, P. And many respectable authorities maintained, after

the statute of 32 Henry VIII, that time of legal memory was sixty years, as Rolle, C. J., *Sergeant Williams*, 2 Wm. Saund. 175, n. a., Lord Mansfield, 2 Ev. Poth. 136, Blackstone, J., 2 Com. 31, Abbott, C. J., 5 B. & A. 215, and Dallas, C. J., C. B. Moore 558.

"From causes which are not now apparent, neither of these views prevailed, and the consequence was that no title to any easement could be supported upon proof of occupation and enjoyment, however long continued, if its origin could be shown." To like effect see *Coolidge v. Learned* (1829) 8 Pick. (Mass.) 1. c. 508. See also Jones, Easements, sec. 158. This section seems to be a superficial and unsatisfactory treatment of the English law.

10. Gale, Easements, 8th Ed. pages 189, 190; *Bryant v. Foot* (1867) 2 Q. B. per Cockburn, C. J., at page 181.

11. *Bryant v. Foot* (1867) 2 Q. B. per Cockburn, C. J., at page 181: "Juries were first told that from user, during living memory, or even during twenty years, they might presume a lost grant or deed; next they were recommended to make such presumption; and lastly, as the final consummation of judicial legislation, it was held that a jury should be told, not only that they might, but also that they were bound to presume the existence of such a lost grant, although neither judge nor jury, nor any one else, had the shadow of a belief that any such instrument had ever really

the period set by the statute of limitations for the bringing of real actions (at first sixty years and finally twenty years in England) the court would instruct the jury that they *might* infer a grant made in modern times but now lost.¹³ This inference, of course, could not be made if the evidence showed that no grant had in fact been made.¹³ Finally, the presumption came to be regarded as conclusive. That is, the court instructed the jury that if twenty years (or whatever the statutory period may be in the particular jurisdiction) uninterrupted, open, exclusive, and adverse user was shown they were bound to presume a grant once made of the easement claimed but now lost. This was attained in England in *Angus v. Dalton*.¹⁴ Although this case has been regarded as settling the law in England in conformity with the rule stated, the opinions of the judges were by no means harmonious.¹⁵

The authorities in this country cannot be said to be altogether harmonious. However, it can be said that the well considered cases which review the authorities and discuss the principles involved are in substantial agreement. They recognize that the theory of a lost grant is wholly a fiction of judicial creation; and they are bold enough to frankly settle upon judicial legislation by which the statute of limitations is extended to incorporeal hereditaments.¹⁶

The question has been considered many times in Missouri and there seems to be (aside from the case under review) an agreement that Missouri follows the English and the better American rule.

existed." In this case Cockburn, C. J., Mellor and Lush, JJ., did their best to prevent the development from taking form in a hard and fast rule.

12. The earliest reported decision to this effect is that of *Lewis v. Price* (1761) 2 Wm. Saund. 175 a, per Lord Blackburn in *Dalton v. Angus* (1881) L. R. 6 App. Cas. at page 812.

13. *Watkins v. Peck* (1843) 13 N. H. 1. c. 370: "The adverse or exclusive use of water in a particular manner, for the term of twenty years, furnishes presumptive evidence of a grant." See comment on this case in *Wallace v. Fletcher* (1855) 30 N. H. 434.

14. L. R. 3 Q. B. D. 85, 4 Q. B. D. 162, 6 App. Cas. 740.

15. See excellent analysis of this case in Gale, Easements, 8th Ed. pp. 194-197.

16. In *Tyler v. Wilkerson* (1827) 4 Mason 397, 24 Fed. Cas. 472, Mr. Justice Story uses this language which has

been widely quoted and followed:

"By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right. . . . The presumption is applied as a presumption *juris et de jure*, wherever by possibility a right may be acquired in any manner known to the law."

In *Wallace v. Fletcher* (1855) 30 N. H. 434, 1. c. 447, Bell, J., speaking for the Supreme Court of New Hampshire employs this clear and persuasive reasoning: "It was the wise course, prescribed by principle as well as by public convenience, to overrule the absurd decisions which sanctioned a fixed point in the early history of England, as the limit of legal memory, and at the same time to restore the principle upon which that decision appears to be made, that in cases where the Legislature have not fixed a precise rule of limitation, rights

In *Pitzman v. Boyce*,¹⁷ Sherwood, P. J., considering a license, stated by way of *dictum*: "Though the statute of limitations has no reference to easements, yet, where a party has enjoyed an easement for such length of time as to confer title to land from the true owner to a disseizor, this adverse enjoyment will in law establish the right to the easement as against the owner of the servient estate."

But he added, "And such adverse user for the statutory period will give origin to the rebuttable legal presumption of a grant, even though the use in its inception was a trespass."

It is submitted that these propositions are contradictory. The authorities cited in support of the first proposition¹⁸ do support it unequivocally (with the exception of *Wood on Nuisances* which is unsatisfactory) and of necessity negative the second. The last three cases¹⁹ cited by the court involve the acquisition of an easement of a right of way by the public. This statement in *State v. Walters* gives the principle: "The public may acquire the right to the use of a road or easement over the land of another from long use of a road as such by the public, acquiesced in by the owner, and adverse occupancy and use of the same for a period of time equal to that prescribed by the statute of limitations for bringing actions of ejectment."

In *House v. Montgomery*²⁰ both licenses and easements are discussed. As to the latter, while it is recognized that there is a conflict of authority, the decision seems to favor the view that user for a period fixed by the statute of limitations is sufficient to establish the easement. Of course, the user must have the proper qualities.

In *Anthony v. Building Co.*²¹ the court denied the existence of an

shall be acquired and barred by a prescription of such length of time as has been fixed by the Legislature as the proper limitation in analogous cases."

In *Tracy v. Atherton* (1864) 36 Vt. 503, Poland, C. J., states the proposition this way: "The statute of limitations does not extend to these incorporeal rights, but it has now become universally settled that an uninterrupted use of a way or other easement, under a claim of right, for the period of time fixed by the statute as a bar to the recovery of the lands held adversely, gives the person so using it a full and absolute right to such easement, as much as if granted to him.

In *Strickler v. Todd* (1823) 10 Serg. & Rawle (Pa.) 63, 1. c. 68, the Supreme Court of Pennsylvania, (opinion by

Duncan, J.) says: "It is well settled, that if there has been an uninterrupted, exclusive enjoyment, above twenty-one years, . . . this affords a conclusive presumption of right in the party so enjoying it, and this is equal to a right by prescription."

17. (1892) 111 Mo. 387; 19 S. W. 1104.

18. *Wood on Nuisances*, sec. 704; *House v. Montgomery* (1885) 19 Mo. App. 170.

19. *State v. Walters* (1879) 69 Mo. 463; *State v. Wells* (1879) 70 Mo. 635; *State v. Proctor* (1886) 90 Mo. 334, 2 S. W. 472.

20. (1885) 19 Mo. App. 170.

21. (1905) 188 Mo. 704, 1. c. 719, 87 S. W. 921.

easement because there was a failure to show that the user was adverse and under a claim of right. The court stated, however, as follows: "When the evidence sufficiently shows the use of the privilege for a length of time equal to that prescribed by the Statute of Limitations for acquiring title to land by adverse possession, and that the use was adverse and under a claim of right with the knowledge of the landowner, the right to the easement is established."

The most effective statement of the prevailing doctrine was made in 1912 by Goode, J.,²² as follows: "But an easement in the nature of a private way may be acquired by prescription or ten year's adverse use, which is equivalent to a grant. In most cases the law allows the prescriptive right on the fiction of a prior grant of which the evidence is lost. In this case a fictitious grant need not be presumed, as there is proof of a futile attempt at an actual grant. Old theories about prescriptions and presumed grants, though still alluded to in opinions for the sake of seeming consistency, don't have much force in modern law. The question of a prescriptive right depends on adverse use for the limitation period."

It will be observed that Goode, J., had before him a case where there had been a futile attempt to make an actual grant. Therefore, it was not possible to decide the case upon any *presumption of a lost grant*. This decision would seem clearly to represent the law of Missouri today.²³

22. *Power v. Dean* (1905) 112 Mo. App. 288, 86 S. W. 1100.

23. *Smith v. Sedalia* (1899) 152 Mo. 283, 53 S. W. 907 (*dictum*); *Howard County v. C. & A. Ry. Co.* (1895) 130 Mo. 652, 32 S. W. 651 (bare statement that county acquired a prescriptive title to bridge by user for ten years; in fact user had been for twenty years at least); *James v. City of Kansas* (1884) 83 Mo. 567 (user of sewer for thirteen years gives a prescriptive right); *Field v. Mark* (1894) 125 Mo. 502, 28 S. W. 1004 (loose *dictum*).

Autenrieth v. St. L. & S. F. Ry. Co. (1889) 36 Mo. App. 254 ("But on the other hand, if the use by the plaintiffs, or the public, was adverse, continuous, and as a matter of right, for the period of ten years prior to the building of the defendant's railroad, then this road was either a public highway or was a private road belonging to the plaintiffs."); *Boyce v. Missouri Pacific Ry. Co.* (1902) 168 Mo. 583, 68 S. W. 920 (all defend-

ant could acquire was an easement. "By analogy, upon the theory of an implied lost grant, the defendant has acquired by prescription an easement" 1. c. 595. "So that although technically the statute of limitation does not apply to an easement, still by judicial interpretation the result is the same as if the statute did so apply.")

Graham v. Olson (1905) 116 Mo. App. 272, 92 S. W. 728 (*dictum*); *Sanford v. Kern* (1909) 223 Mo. 616, 122 S. W. 1051 (right of way, the outcome of an oral agreement, was used for fourteen years. Decision in favor of person claiming the right of way. Opinion somewhat confused in that the writer seems to think that an easement obtained by prescription is the same as a so-called irrevocable license.

The court also announces this *curious* doctrine: "In the first place Sanford's claim to an easement originated in contract. He was not an interloper, squatter or mere trespasser. This is impor-

It is good policy to bar stale claims.²⁴ The propriety in applying, by way of analogy, the period set by the statute of limitations for the bringing of actions to recover land to easements is apparent. The first statute of limitations was so applied. The reason for the departure from this precedent does not appear to be explained by the authorities and the weight of modern authority follows it.²⁵

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tant as furnishing a foundation for a claim of right, because the Statute of Limitations borrowed to effectuate prescriptive rights, can only be invoked by a person claiming by right and not by wrong. No flux of time will ripen a bad title into a good one unless possession is blessed by a claim of right."

How is that declaration to be reconciled with this paragraph in the same opinion: "That a prescriptive right is, by a fiction of the law, deemed to rest in a grant, or lost deed, as the old learning teaches, is of small significance in modern jurisprudence; for it is settled law that the right to a way by prescription may be established in the same way as the title to land, to-wit, by adverse possession under a claim of right uninterrupted for ten years"? *Power v. Dean* approved.)

Geisman v. Trish (1910) 151 Mo. App. 714, 132 S. W. 298 ("The rule is that an easement in nature of a private way may be acquired by ten years' adverse use, and that a right thus acquired is a vested right.") *Leiwake v. Link* (1909) 147 Mo. App. 19, 126 S. W. 197. ("After the year 1847, when the limitation period of actions to recover real property was reduced from twenty to ten years, the public might have acquired an easement in the road by ten year's open, adverse and uninterrupted use under a claim of right."); *Dunham v. Joyce* (1895) 129 Mo. 5, 31 S. W. 337 (*dictum*).

Daudi v. Steiert (1918) 205 S. W. 222 (There was a claim of an easement of

drainage but the court decided that there was nothing more than a license. In arguing against the existence of an easement, Walker, P. J., made this curious statement: "There must, however, be as a condition precedent to the establishment of an easement by prescription, clear proof of a well-defined oral agreement in regard thereto." Such seems to be contrary to the theory of prescription even including the fiction of a lost grant. For a grant was in writing.); *Schroer v. Brooks* (1920) 204 Mo. App. 1. c. 581, 224 S. W. 53 ("The objection to this deed was based altogether upon the theory that an easement lies only in grant. Such was the fiction of the common law, and where the easement had been enjoyed for a sufficient length of time, a grant of that easement was presumed, but a prescriptive right does not rest exclusively in grant, it may be established in the same way as title to land, that is, by adverse possession under a claim of right uninterrupted for ten years. The deed was sufficient to show the intent of the plaintiff to claim from Wolf Pen Hollow, southeasterly, etc., and the ten-year statute ran against the grantor in that deed.") See also *Novinger v. Shoop* (1918) 201 S. W. 64.

24. Tiffany, *Real Property*, 2nd. ed., sec. 514 and authorities there cited; Jones, *Easements*, secs. 161-162; 9 R. C. L. 783; Washburn, *Easements*, p. 106.

25. See 16 Harv. L. R. 438; 2 ib. 43-44; 7 ib. 234.

BAR BULLETIN

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CONFERENCE ON LEGAL EDUCATION

The conference presented several notable angles. It was held in historic D. A. R. Hall, where, but the hour before its convening, so to speak, the World Disarmament Conference was in session. The meeting itself was notable in the number and conspicuous character of the participants and visitors.

There was presiding over the opening session, Mr. Elihu Root; over its second session, Mr. Chief Justice Taft; over its third session, former Director General and Secretary, Wm. G. McAdoo; and over its fourth and final session, former Ambassador John W. Davis. The addresses by these gentlemen—perhaps more accurately designated discussions—and the debates during the two days' conference were vigorous, incisive, illuminating and full of dramatic interest.

There were former Governor Hadley, of Missouri, Dean Stone of Columbia Law School, Professor Samuel Williston, of Harvard, President Angell, of Yale, Draper Lewis of Pennsylvania, Ex-Senator Thomas, of Colorado, James Byrne, former Attorney General Wickersham, Chas. A. Boston, Julius Henry Cohen, of New York, John Lowell, of Boston, and many more, if less known, none the less able, engaged in the debate

on whether the lawyer shall be educated or uneducated, literate or illiterate.

Mr. Root opened the meeting with a climax and closed it with a super-climax. He talked extemporaneously, immediately lifting the subject of discussion to that intellectual altitude where he is wont to move, and where he forcibly upheld the cause of literacy, enlightenment and character as prerequisite qualities necessary to be instilled in the lawyer, if he shall be the power for good government and for the maintenance of American institutions he must be if they shall be perpetuated.

Two points Mr. Root especially stressed: the fundamental necessity for character in the lawyer, and the importance of impregnating the lawyer of foreign parentage with the traditions and genius of our institutions, the practical method of accomplishing this being cutaneous absorption through daily contacts and experiences in the life of our American colleges and educational institutions. In the final session, Mr. Root closed the debate with an apotheosis to character, illustrating in his concluding sentences the tremendous advantage a trained intellect, supplied with the storehouse of knowledge education gives, when, in impassioned and epigrammatic words and phrases he drew and quoted, not from the law, but from the wealth of lore his broad education has provided.

Those who attended the sessions throughout know now why Mr. Root, as a debater, lawyer, and statesman is in a class apart. They had the experience of seeing and listening to a man well past seventy whose mind works with the precision of a Corliss engine and the illuminating qualities of a nitrogen lamp, while he speaks with the vigor, emotional energy and impassioned enthusiasm of a man of forty. When he left the platform everyone realized the debate was finished and a loud call immediately went up for the vote on the principal resolution and all pending amendments. The amendments were almost unanimously lost and the resolution carried by a like vote. As Mr. Root passed out the aisle on the way to his train, he was accorded an ovation such as an orator or debater rarely ever receives. Coadjutor and opponent, stranger and friend, alike showered him with compliments and congratulations, hand shakes and praises. One of those who debated against him said later: "I was glad to be licked by him. I would rather take a licking from such a man every day. If I voted on my own amendment I voted against it."

Many of the speakers made the point, if it be a point, that Lincoln and others of our illustrious dead did not have college or law school educations. With as much logic they might have included Moses. The answer made was that Lincoln and the others met the then requirements, and would, were they here now, meet the proposed requirements. In other words, the genius of tomorrow, destitute of worldly goods, will overcome all obstacles and will secure the necessary educational qualifications.

Nor was the meeting wanting in either comedy or pathos. More than once during the session the sublime was heightened by the ridiculous. One speaker, *saue* of manner, keen of wit, and with an accent as entrancing as a purling brook, said that down in his state, all the rural districts and small towns would, owing to the general illiteracy and ignorance of the population, be lawyerless, if the standards prescribed by the resolution be attained, because a lawyer so highly educated would not remain in those districts. His efforts to demonstrate that uneducated lawyers are a necessity in some part of his state, was probably on the theory that the blind can best lead the blind. Answering, an eastern speaker, with an east side accent, and a pronunciation reasonably nasal, not satisfied with two years' college training, insisted on a Bachelor's degree and demanded that the embryo lawyer be a master of rhetoric and required to speak the English language. The audience, understanding the words "rhetoric" and "English language", was convulsed.

One distinguished defender of the inalienable right of ignorance and illiteracy to remain supreme, lest some poor genius be denied the right to make money as a lawyer, said that the whole matter was well illustrated by the experience of a young Easterner who came to his (the speaker's) country, with letters of introduction from his parents, his pastor and others, and, upon presenting them to a president of a bank for introductory purposes, the banker interrupted him with the remark that he didn't give a damn about his religion, but to let him see his collateral. Such argument is unsound in theory and in practice. Its application was that character in a lawyer is of no consequence; that the important thing was that he get results; that he supply the evidence necessary to win; in short, that he vitalize the philosophy that; "The end justifies the means".

The affirmative of the debate appeared to me to have the better of it, as it was practically conceded by the negative that the educational facilities the country over are such that one, whether he be rich or poor a genius or otherwise, can get an education if he wants it. As I listened to the debate, particularly to the negative, I was forced to the conclusion that there is a general misconception, even among lawyers, as to the purpose and functions of the legal profession, in that it is conceived to be, by many, a business, the purpose of which is to provide a means of livelihood for its members, rather than a franchise granted by society, primarily for the purpose of protection and benefit to society itself. Emphasis on this distinction to the Bar and laity, alike, will strengthen the Bar and increase the respect of the laity for it. It is a bit curious that those who conceive the profession to be merely a means of livelihood to its votaries, fail to realize that it has been established by the most irrefragable evidence that no investment pays such big dividends as an

investment in education. I think it may be demonstrated that the money value of an education exceeds the money value of any known commodity. Lawyers or laymen interested in that proposition will do well to secure from the Department of the Interior, educational bulletin No. 22, for the year 1917, entitled, "The Money Value of an Education". They will there find an analysis of statistical data fairly establishing that the child with no schooling has but one chance in one hundred fifty thousand to perform distinguished service, while the child with elementary education has four times the chance, and the child with high school education has eighty-seven times that chance, and the child with college education has eight hundred times that chance.

From the debate it seems obvious to me that one of the principal causes responsible for loss of public respect for the Bar, as a whole, is that the Bar is not keeping abreast educationally with the other learned professions or businesses. Mining, medicine, engineering, chemistry, journalism, manufacturing, banking, transportation, the ministry, the army and the navy, have each set an educational standard far beyond that set by the bar. The lawyer whose education is limited to familiarity with the statute for forcible entry and detainer and whose admission to practice was procured by motion of the county sheriff, may inspire his hill district clients, but he would hardly be expected to challenge the admiration of the college trained men now dominating every industry and every branch of every industry, as well as every learned profession.

The meeting had its social side and setting. There was the reception and tea at the New Willard Hotel in honor of Mrs. Taft, wife of Mr. Chief Justice Taft; the reception at the White House, when the President and Mrs. Harding and Attorney General Daugherty received the visiting delegates and their wives, and also some dozen or more private receptions and formal dinners in honor of the occasion. The reception at the White House was not an ordinary formal reception, at which a delegation was formally received by the President and Mrs. Harding, but was what might be called a "White House Party". The White House was decorated especially for the occasion, those attending being individually invited and admitted by personal card issued to each. The guests assembled in the great ball room of the White House, beautifully decorated for the occasion, and from there passed to the green room, where each was introduced by name to, and was welcomed by the President and Mrs. Harding and Attorney General Daugherty, in words and fashion of hosts receiving their friends. The introductions over, the guests went at will about the White House parlors, gaily chatting with each other and partaking of the hospitality and refreshments.

W. H. H. PIATT

Kansas City, Missouri.

KANSAS CITY MUNICIPAL COURT

An effort to secure a unified court for Kansas City in the recent session of the Missouri legislature resulted in the passage of a compromise bill which gives that city an inferior civil court of good organization and powers. It is a court very similar to the Civil Court of Milwaukee. Ten years ago the establishment of such a court in any large city would have been considered cause for thankfulness. There still remains as much opportunity for such a court to render good service, but with further experience the ideal has advanced and today anything short of complete unification of courts in any large city is recognized by progressives as a makeshift.

The disadvantages of the new court are that it remains a justice of the peace court and its judges are known as justices of the peace, and their salaries are but \$3,500 and \$4,000 for the associate justices and presiding justice, respectively. The first objection is not substantial, but the salary limitation will make it difficult, if not impossible, to get high class professional material for judges.

The good features are that the court is given rule-making and administrative authority and responsibility for management is centered in the presiding justice. There are to be a chief clerk and chief constable who are to be subject to the "superintending control" of the presiding justice, together with their deputies.

The court has jurisdiction throughout the county in tort and contract cases involving not more than \$1,000. The act contains a drastic provision concerning jury demands, for the party who demands jury trial may be required to deposit a sum sufficient to pay all the fees of the jurors.

It is required by the new law that justices shall be lawyers. This will doubtless result in considerable improvement in the administration of justice in Kansas City in the smaller civil causes, but the new court will be subject to all the limitations inherent in an inferior court.—*Journal, American Judicature Society, Vol. V, p. 4.*

CONSTITUTIONAL LAWYERS—Unless he sits on the Bench of the Supreme Court and hears, day after day, the astonishing discussions and distinctions there presented, no man can fully realize the extent to which ingenuity and refinement of constitutional discussions are rapidly converting the members of our profession in this country into a group of casuists rivaling the Middle Age schoolmen in subtlety of distinction and futility of argument.—Mr. Justice Clarke, before New York University Law Alumni.

CONFERENCE OF BAR ASSOCIATION DELEGATES

The Conference of Bar Association Delegates held at Washington in February of this year, will be a landmark in the history of the American Bar. At this great meeting there were in actual attendance delegates from forty-four state bar associations, the District of Columbia, and one hundred fourteen city and county associations in all parts of the United States, a delegate from the Far Eastern American Bar Association in China, delegates from three Canadian Associations, and representatives from a large number of the great colleges, state universities and law schools of the country. The Missouri Bar Association had three delegates in attendance and there were also delegates from the St. Louis, Kansas City, St. Joseph and Springfield Bar Associations. I believe it is not going too far to say that this conference and the resolution it adopted represent the most important and far reaching step ever taken by the American Bar.

That a resolution such as was adopted should have met with opposition in the conference was to have been expected. The conference was not "packed" for any particular program. Delegates were not selected from any of the associations with any particular program in view nor were any of them instructed beforehand what sort of a program to stand for or how to vote. The opposition was a valuable thing, because it brought about a full and complete discussion of the resolution from all points of view and the delegates were thereby fully informed on all sides of the question before the final vote.

The most significant feature of the conference from my view is the fact that substantially all of the arguments presented by those opposed to the resolution were presented not from the viewpoint of the welfare of the public generally or even of the welfare of the Bar generally, but from the viewpoint of the welfare of a comparatively few individuals. The desirability of college training for the lawyer or other professional man is no longer questioned in enlightened circles today. If college training be not desirable then the entire educational system of the whole country, which it has taken so many years and so much money to build up, is wrong. The opposition did not seriously question the desirability of college training for the lawyer nor the fact that a requirement of two years of college work would elevate the standards of the Bar and thereby benefit the Bar and the public at large; but rather they centered their attack upon the proposition that such a requirement would prohibit many deserving young men from becoming lawyers. They cited the great self-made lawyers of the past as well as many prominent lawyers of the present day who have succeeded without college training. They argued that these men would have been barred from the practice of the law by the standards set up in the resolution. But it seems too clear for

argument that with the splendid educational facilities of today, the vast majority of men who have the courage, initiative and ability to become able lawyers without the advantage of a college education can very easily secure two years of college training by the expenditure of only a comparatively small portion of the effort, ability and self denial required to reach a commanding position at the Bar. Surely we should not adopt a standard generally to cover the isolated instances here and there in which it may not be possible to secure this training. Legislation generally goes on the theory of the greatest good to the greatest number, and practically all legislation results in some hardship to a few persons. The right to practice law is not inalienable. Is it better that the public and the Bar as a whole shall continue to suffer from the work of ignorant, incompetent and poorly trained lawyers or that the standards of the Bar shall be raised by the adoption of more stringent educational requirements, even though the latter course may result in a few isolated instances in barring young men from becoming lawyers and forcing them to seek other lines of avocation?

Is the law a learned profession? We say it is and surely it ought to be, but in Missouri the only educational requirements for admission to the Bar are that an applicant shall have completed a course in a grade school or have acquired an education equivalent thereto, and be able to pass the state Bar examination on legal subjects. It is well known, of course, that any man may cram for such an examination and pass it and at the same time have little knowledge of the fundamentals of the law. Can we, therefore, say that a man must be learned in any proper sense of that word in order to enter the profession of the law in this state?

The resolution adopted by this conference represents the almost unanimous expression of the best legal and educational thought of the country and I hope the requirements it provides may be adopted at an early date in Missouri.

MURAT BOYLE

Kansas City, Missouri.

BAR ASSOCIATIONS—The duty to maintain and transmit these traditions unimpaired stands in the forefront of those debts which every lawyer owes to his craft; and since it is a thing only to be performed effectively by concerted action, it forms in and by itself a sufficient reason for the formation of bar associations and makes the call to membership in them imperative. Not only have the bar associations of the United States done vital work in guarding the standards of professional training and conduct, but they offer the only avenue to solidarity, and in the last resolve the most effective means of inspiration and of discipline. The profession should not rest content until every lawyer worthy of the name is inscribed upon their rolls.—John W. Davis before New York State Bar Association.

WASHINGTON RESOLUTION

RESOLVED; That the National Conference of Bar Association adopts the following statement in regard to legal education:

1. The great complexity of modern legal regulations requires for the proper performance of legal services lawyers of broad general education and thorough legal training. The legal education which was fairly adequate under simpler economic conditions is inadequate today. It is the duty of the legal profession to strive to create and maintain standards of legal education and rules of admission to the bar which will protect the public both from incompetent legal advisers and from those who would disregard the obligations of professional service. This duty can best be performed by the organized efforts of bar associations.

2. We endorse with the following explanations the standards with respect to admission to the bar, adopted by The American Bar Association on September 1, 1921:

Every candidate for admission to the Bar should give evidence of graduation from a law school complying with the following standards:

(a) It shall require as a condition of admission at least two years of study in a college.

(b) It shall require its students to pursue a course of three years' duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only part of their working time to their studies.

(c) It shall provide an adequate library, available for the use of the students.

(d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

3. Further, we believe that law schools should not be operated as commercial enterprises, and that the compensation of any officer or member of its teaching staff should not depend on the number of students or on the fees received.

4. We agree with the American Bar Association that graduation from a law school should not confer the right of admission to the Bar, and that every candidate should be subjected to examination by public authority other than the authority of the law school of which he is a graduate.

5. Since the legal profession has to do with the administration of the law, and since public officials are chosen from its ranks more fre-

quently than from the ranks of any other profession or business, it is essential that the legal profession should not become the monopoly of any economic class.

6. We endorse The American Bar Association's standards for admission to the Bar because we are convinced that no such monopoly will result from adopting them. In almost every part of the country a young man of small means can, by energy and perseverance, obtain the college and law school education which the standards require. And we understand that in applying the rule requiring two years of study in a college, educational experience other than that acquired in an American college may, in proper cases, be accepted as satisfying the requirement of the rule, if equivalent to two years of college work.

7. We believe that the adoption of these standards will increase the efficiency and strengthen the character of those coming to the practice of law, and will therefore tend to improve greatly the administration of justice. We therefore urge the bar associations of the several states to draft rules of admission to the Bar carrying the standards into effect and to take such action as they may deem advisable to procure their adoption.

8. Whenever any state does not at present afford such educational opportunities to young men of small means as to warrant the immediate adoption of the standards, we urge the bar associations of the state to encourage and help the establishment and maintenance of good law schools and colleges, so that the standards may become practicable as soon as possible.

9. We believe that adequate intellectual requirements for admission to the Bar will not only increase the efficiency of those admitted to practice but will also strengthen their moral character. But we are convinced that high ideals of professional duty must come chiefly from an understanding of the traditions and standards of the bar through study of such traditions and standards and by the personal contact of law students with members of the Bar who are marked by a real interest in younger men, a love of their profession and a keen appreciation of the importance of its best traditions. We realize the difficulty of creating this kind of personal contact, especially in large cities; nevertheless, we believe that much can be accomplished by the intelligent cooperation between committees of the Bar and law school faculties.

10. We therefore urge courts and bar associations to charge themselves with the duty of devising means for bringing law students in contact with members of the Bar from whom they will learn, by example and precept, that admission to the Bar is not a mere license to carry on a trade, but that it is an entrance into profession with honorable traditions of service which they are bound to maintain.

COMMERCIAL COURTS—The present Judge who sits in the Commercial Court, Mr. Justice Bailhache, is carrying on the traditions of the Court with the greatest success and the fullest confidence of all who appear before him. I asked him how long he was taking at present to try his commercial cases, and he said that the average time from the time you went to the Judge to the time the case was heard was two months. Now, in the United States no commercial case is heard under a year. And these quick hearings in our Commercial Court are the things that have struck lawyers over here from the United States. Apparently in the United States they are still in the stage that we used to be in. They are using the old English forms and particulars for delay, freely availed of by defendants who want to be dilatory. There the plaintiff complains that he cannot get a decision, because the judges, being popularly elected, are tied down by strict rules of procedure. Here the speed is such that the defendant may howl because the case is decided before he has time to turn around.—Lord Justice Scrutton, 1 Cambridge Law Journal, p. 17.

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